No. 99-2035-CFX Title: Cooper Industries, Inc., Petitioner
v.
Leatherman Tool Group, Inc.

Docketed: June 20, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	May 22 2000	Application (99A960) to extend the time to file a petition for a writ of certiorari from June 1, 2000 to June 22, 2000, submitted to Justice O'Connor.
	May 23 2000	Application (99A960) granted by Justice O'Connor extending the time to file until June 22, 2000.
	Jun 20 2000	Petition for writ of certiorari filed. (Response due August 3, 2000)
	Jul 3 2000	Order extending time to file response to petition until August 3, 2000.
	Aug 3 2000	Brief amici curiae of Erwin Chemerinsky and Arthur McEvoy filed.
	Aug 3 2000	Brief of respondent Leatherman Tool Group, Inc. in opposition filed.
	Aug 16 2000	DISTRIBUTED for Conference of September 25, 2000
	Aug 17 2000	Reply brief of petitioner Cooper Industries, Inc. filed.
	Oct 2 2000	REDISTRIBUTED for Conference of October 6, 2000
	Oct 10 2000	Petition GRANTED. limited to the following question: "What is the standard of review of a trial court's ruling on a challenge tothe constitutionality of a punitive damage award?" SET FOR ARGUMENT February 26, 2001. **********
	Nov 3 2000	Order extending time to file petitioner's brief on the merits to and including December 4, 2000.
	Nov 15 2000	Order extending time to file respondent's brief on the merits to and including January 16, 2001.
	Dec 1 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
	Dec 4 2000	Joint appendix filed.
	Dec 4 2000	Brief of petitioner Cooper Industries, Inc., filed.
	Dec 4 2000	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	Dec 4 2000	Brief amici curiae of American Home Products, et al. filed.
	Dec 4 2000	Brief amici curiae of American Tort Reform Association, et al. filed.
	Dec 4 2000	Brief amici curiae of California Employment Law Council, et al. filed.
	Dec 4 2000	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Dec 4 2000	Brief amicus curiae of Product Liability Advisory Council, Inc., filed.
	Dec 4 2000	Brief amicus curiae of petitioner General Dynamics Corporation filed.
	Dec 4 2000	Brief amici curiae of Alliance of American Insurers, et al. filed.

No. 99-2035-CFX

Entry	Date	Proceedings and Orders
	Dec 4 2000	Brief amicus curiae of Association of American Railroads filed.
	Dec 26 2000	Record filed.
	Dec 27 2000	Record filed.
	Dec 27 2000	Record complete.
	Jan 16 2001	Brief of respondent Leatherman Tool Group, Inc. filed.
	Jan 16 2001	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jan 16 2001	Brief amicus curiae of Arthur McEvoy filed.
	Jan 19 2001	CIRCULATED.
	Feb 15 2001	Reply brief of petitioner Cooper Industries, Inc. filed.
	Feb 26 2001	ARGUED.

Supreme Court, U.S.
FILED

99 2035 JUN 20 2000

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit, aligning itself with the Second and Seventh Circuits, erred in using an "abuse of discretion" standard to review a trial court's ruling on a challenge to the constitutionality of a punitive damages award, as opposed to applying a *de novo* review standard, as the Third, Eighth, Tenth, and Eleventh Circuits have done?

2. Whether the punitive damage award imposed against Petitioner and affirmed by the Ninth Circuit, which is ninety times the Respondent's purely economic compensatory damages, violates Petitioner's due process rights under criteria articulated in *BMW of North America, Inc. v. Gore*?

PARTIES TO THE PROCEEDING

Cooper Industries, Inc. is the only petitioner in this proceeding. Petitioner certifies pursuant to Supreme Court Rule 29.6 that it has no parent corporation nor are there any publicly held companies owning 10% or more of its stock.

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In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cooper Industries, Inc. respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit simultaneously issued two opinions—one unpublished (App. 1a-5a) and one published (App. 6a-17a)—in resolving the case below. The published opinion is reported at 199 F.3d 1009. The district court's judgment (App. 19a-26a) and post-verdict Order denying Petitioner's motion for judgment as a matter of law (App. 27a-31a) are unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decisions on December 17, 1999. The court denied Petitioner's timely petition for rehearing/rehearing en banc on March 3, 2000. (App. 18a). Petitioner sought and received from Justice O'Connor an extension of time, to and including June 22, 2000, in which to

file its petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Due Process Clause of the Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of . . . property, without due process of law." U.S. CONST. amend. V.

STATEMENT OF THE CASE

Petitioner Cooper Industries, Inc. ("Cooper") and Respondent Leatherman Tool Group, Inc. ("Leatherman") are both hand tool manufacturers. In the early 1980s, Leatherman developed and began to market a multi-function hand tool, which it named the Pocket Survival Tool ("PST"). Although Leatherman has sold millions of these devices over the last two decades, it has never received a patent for the tool.

In 1995, Cooper sought to develop a similar product in an attempt to compete with the PST in the hand tool market. (ER 1081-83; Tr. 865-68).[1] In this endeavor, Cooper, as it is legally entitled to do, (App. 16a), largely copied the basic functional design of the PST, albeit with several modifications, including the additions of a serrated knife, a locking mechanism, and removable fasteners. (ER 326-28).

Early in the development stage, Cooper constructed a mock-up of its new tool, which it ultimately named a "Toolzall," for initial layouts in advertisements. (Tr. 947-48). At the time—approximately June or July, 1996—the first of Cooper's new tools had not rolled off the production line. (ER 688; Tr. 948.) Peter Jones, Cooper's brand manager on the Toolzall project, thus instructed employees at the company's plant to put together a prototype for advertising purposes. (ER 688).

[1] "Tr." refers to the trial transcript. "ER" refers to the Excerpt of Record in the Ninth Circuit.

Unbeknownst to Jones, an engineer at Cooper's plant assembled the Toolzall prototype by modifying the substantially similar looking Leatherman PST. (ER 688-89; Tr. 949-52). In particular, Cooper's unique fasteners were placed on a PST and all designating Leatherman marks were removed. (ER 337, 705). Testimony revealed, and the Ninth Circuit acknowledged, that the visual distinctions between the photographed Toolzall mock-up and the genuine Toolzall tool are virtually imperceptible.[2] (App. 3a; Aplt's Op. Br. at 7).

Cooper formally introduced its Toolzall product at the National Hardware Show in August, 1996. (Tr. 886). At this event, Cooper used photographs of the modified PST in its advertisements, press kits, packaging, and other disseminated materials. (ER 623-26). Cooper also employed the same mock-up photos in promotional materials sent to various magazines and mail-order catalogs. (ER 626).

While attending the 1996 hardware show, Leatherman co-founder and president Tim Leatherman carefully examined the Toolzall mock-up photographs posted in the Cooper booth and discerned a similarity between the Cooper tool and the Leatherman PST. (Tr. 99-100). After the show, he noticed the same modified PST photographs in magazine and catalog advertisements as well as on the Toolzall package itself. (Tr. 104).

In September, 1996, Leatherman filed the instant action against Cooper in the United States District Court for the District of Oregon. The complaint included a Lanham Act

[2] One discernable distinction was the difference in the primary knife texture. Specifically, the genuine Toolzall has a serrated blade while the mock-up (like the PST) contains no such feature. (Tr. 951). At the time the mock-up was created, however, Cooper had not yet decided to utilize a serrated blade on its tool. (Tr. 951-52).

trade dress infringement claim and common law causes of action for unfair competition, false advertising, and "passing off." In addition to damages, Leatherman sought an injunction against the manufacture and sale of the Toolzall, and against any further use of the modified PST in Toolzall advertising. (App. 32a).

Cooper immediately conceded that its advertisements using a modified PST were technically improper. In fact, Cooper voluntarily withdrew its Toolzall from the domestic market in the middle of October, 1996, (Tr. 733), and sent a written notice to its sales personnel on November 20 ordering the recall of all Toolzall promotional materials bearing photographs of the modified PST. (ER 1070). Cooper then agreed to enter into a "Stipulated Order for Preliminary Injunction with Respect to [its] Advertising," which the court promptly signed on December 20, 1996. (ER 25-26). The Order enjoined Cooper from using any photograph of a Leatherman tool, modified or otherwise, in Toolzall advertising or packaging. (*Id.*).

Contemporaneous with the issuance of the advertising injunction, the court, concluding Leatherman had demonstrated a likelihood of success on its trade dress infringement claim, entered a separate preliminary injunction enjoining Cooper from conducting any additional sales of its Toolzall product in the United States pending the outcome of the litigation. (App. 44a). The combined effect of the October, 1996 voluntary withdrawal and December, 1996 preliminary injunction was that Cooper did not sell a single original Toolzall in the United States after October, 1996.[3] (Tr. 1061-62; Ex. 615).

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[3] Cooper introduced a new Toolzall in 1997 that was highly dissimilar to the PST. No advertisements using a modified PST appeared for the new Toolzall. (Tr. 1061-62). Although Leatherman amended its complaint to allege that the new Toolzall also infringed on its trademark rights, that claim was flatly rejected by the jury. (ER 750). There has

(footnote continued on next page)

In 1997, despite both the advertising injunction and written directive to its sales personnel, Cooper discovered that photographs of the modified PST were appearing periodically in Toolzall ads in various catalogs and magazines. (Tr. 367-69). Notably, the injunction had not required a recall of marketing literature that had previously been distributed to *resellers*.[4] Upon being alerted of this continuing situation by Leatherman's counsel, Cooper sent a letter on April 24, 1997, to all of its domestic resellers/distributors, ordering that any outstanding promotional materials depicting a modified PST be returned to the company immediately. (Tr. 906-08). In practical terms, none of the recalled advertisements resulted in any revenue to Cooper inasmuch as the company was under an injunction barring it from selling the Toolzall. (Tr. 898).

Leatherman's lawsuit proceeded to trial in October, 1997. Leatherman's experts testified that the damages flowing from Cooper's allegedly unlawful activities were roughly equivalent to Cooper's profits on the original Toolzall. (Tr. 701-02; Instruction 36). According to Cooper expert witness Creighton Hoffman, whose testimony the jury apparently accepted, Cooper's gross profits from nationwide Toolzall sales approximated $50,000. (Ex. 678). No attempt was made by Leatherman or its experts to segregate damages on the trade dress infringement claim from damages on the common law false advertising/"passing off" causes of action.

On October 17, the jury returned a verdict concluding that Cooper's original Toolzall (although not its new Toolzall) had infringed on Leatherman's trademark rights in the PST, but that Leatherman had suffered no damages from the infringement. (ER 749-51). The jury further determined

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never been any suggestion that consumers viewing the new Toolzall would have confused the device for a PST.

[4] Cooper sells its products through resale distribution channels, rather than by direct sales to end-user consumers. (Tr. 936-37).

that Cooper had engaged in common law unfair competition, "passing off," and false advertising, causing Leatherman $50,000 in damages. (ER 751). The jury also imposed $4.5 million in punitive damages against Cooper on the common law claims. (ER 751-52).[5]

Cooper filed a timely post-trial motion seeking a reduction of the punitive damage award as a matter of law. Cooper argued, *inter alia*, that because the visual distinctions between the genuine Toolzall and the modified PST appearing in the Cooper advertisements were virtually indiscernible, there was no possibility the ads had any effect on Leatherman's reputation. Cooper further emphasized that, since it had made no Toolzall sales after October, 1996, its controverted ads could not have had more than the most minimal impact on Leatherman's sales. Finally, Cooper maintained that a punitive damage award which was ninety times the amount of the purely economic compensatory damages purportedly suffered by Leatherman violated Cooper's due process rights, as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

In its abbreviated entry of judgment issued November 17, the district court denied Cooper's motion to reduce the punitive damage award. (App. 24a). It dealt perfunctorily with the *Gore* issue by offering no more than the following conclusory statement: "I find that the award is fairly proportional given both the nature of the conduct, evidence of intentional use of the modified [PST] and the size of an award necessary to deter future similar conduct given defendant's size and assets." (App. 24a). In a subsequent order denying Cooper's formal motion for judgment as a matter of law, the court also refused to reduce the punitive damages pursuant to Oregon law. (App. 29a-31a).

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[5] The district court later issued a permanent injunction enjoining Cooper from selling its original Toolzall within the United States.

Cooper then appealed. The Ninth Circuit, in a published opinion, reversed the district court verdict on the trade dress infringement claims and vacated the injunction. (App. 6a-17a). It held that the design of the unpatented PST was entirely functional and, therefore, was not protectable trade dress. (App. 10a) ("[T]he physical details and design of a product may be protected under the trademark laws only if they are nonfunctional.").

At the same time, in a separate unpublished opinion, the Ninth Circuit affirmed the jury's verdict on liability and damages as to the common law claims. (App. 1a-5a). While acknowledging that Cooper's false advertising/"passing off" was highly "unusual" in that no consumers could have been deceived by its conduct, (App. 3a), the court held Cooper's conduct amounted to "literal passing off" and may have given Cooper an unfair advantage by allowing it to obtain a mock-up photograph of its Toolzall more quickly than if it had started from scratch or waited until the genuine Toolzall had come off the production line. (App. 3a-4a). Moreover, despite the district court's characterization of Cooper's post-injunction Toolzall advertisements as "inadvertent," (App. 31a), the Ninth Circuit added that Cooper's failure to remedy the problem after an injunction had issued suggested "an indifference to legal consequences." (App. 4a). With respect to the punitive damages due process issue, the Ninth Circuit applied a deferential standard of review and held the district court did not abuse its discretion in refusing to reduce the punitive damages. (App. 3a-4a).

REASONS FOR GRANTING THE WRIT

This case presents the Court with an ideal opportunity to resolve the split among appellate courts at both the federal and state levels over the proper standard of review applicable to claims of unconstitutionally excessive punitive damage awards.[6] While the Court has entertained several Due Process Clause challenges to the excessiveness of particular awards, it has never addressed the correct standard of review on this issue.

Supreme Court guidance is crucial here inasmuch as the varying standards have incubated an environment in which there is neither rationality nor predictability to the amounts of such awards. This conflict has reinforced the arbitrariness of punitive damage awards and, in jurisdictions employing a highly deferential standard, as is the case here, effectively deprived defendants of meaningful appellate review, which this Court has identified as the primary check on runaway juries. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (punitive damages pose acute risk of arbitrary deprivation of property, and meaningful judicial review acts as a safeguard against that danger). Moreover, the deferential standard of review has enabled, if not encouraged, lower courts to maintain only the most illusory sensitivity to the Supreme Court's due process jurisprudence.

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[6] The Supreme Court has held that federal courts measuring the excessiveness of *non-punitive damage* awards *under state law* must invoke an abuse of discretion standard of review. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 422, 435 (1996). That decision has no bearing here. The question presented in the instant dispute is the proper standard of review for measuring the excessiveness of punitive damages under the federal Constitution. In fact, the Court has expressly left open the issue currently confounding federal appeals courts across the country. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

I. Courts are Divided over Proper Standard of Review in Evaluating Due Process Challenges to Punitive Damages Awards

A. Appellate Split Between *De Novo* and Deferential Standards of Review

At least four federal circuit courts of appeal apply a *de novo* standard of review in examining constitutional attacks on the excessiveness of punitive damage awards. *See United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1229 (10th Cir. 2000); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467-70 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 791 (2000); *United States v. Big D Enters., Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999).[7] These courts predicate their *de novo* review on the fact that not only is the excessiveness a legal issue in this context, but "there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture." *Johansen*, 170 F.3d at 1334. In other words, deference to a lower court has no place where constitutional standards are being applied.

There are, nonetheless, at least three other federal appellate courts, including the Ninth Circuit, which adhere to a highly deferential "abuse of discretion" standard in assessing punitive damage awards for constitutional excessiveness. *See Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909 (9th Cir.

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[7] In the Eleventh Circuit, although the ultimate constitutional inquiry is conducted *de novo*, the district court's underlying factual findings are reviewed for clear error. *Johansen*, 170 F.3d at 1334.

1999);[8] *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 736 (7th Cir. 1998); *Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996). Under this test, the appellate court's role is simply to determine if the district court has abused its discretion in ruling that a particular award does not "shock the judicial conscience." *Lee*, 101 F.3d at 808.

Nor is there unanimity among state appellate courts in crafting an appropriate standard of review on the due process issue. Oregon, for example, has construed *Gore* to require an independent appellate assessment of the jury's punitive damage award for possible unconstitutional excessiveness, without regard to the trial court's reasoning. *MacCrone v. Edwards Ctr., Inc.*, 980 P.2d 1156, 1165 (Or. Ct. App. 1999) (en banc). Arkansas similarly appears to follow a *de novo* review approach. *Routh Wreckage Serv., Inc. v. Washington*, 980 S.W.2d 240, 244-45 (Ark. 1998). Other states, however, examine trial court rulings on this issue under highly deferential standards. *See, e.g., Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 595 (Iowa 1999) (abuse of discretion); *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 413-15 (Ky. 1998) (clear error).[9]

In the case at bar, rejecting Petitioner's proposed standard, the Ninth Circuit opted to review the district court's

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[8] An earlier Ninth Circuit opinion suggested a *de novo* standard is applicable to the review of purported Due Process Clause violations. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996). This decision apparently is not followed in the circuit.

[9] The Supreme Court recently denied a certiorari petition purportedly presenting a similar issue regarding the correct standard of review in evaluating claims of constitutionally excessive punitive damage awards. *Paracelsus Healthcare Corp. v. Willard*, 754 So. 2d 437 (Miss. 1999), *cert. denied*, 68 U.S.L.W. 3748 (U.S. June 5, 2000). Although the petitioner there argued that the Mississippi Supreme Court employed a very deferential review standard, the text of the opinion suggests the court, in fact, undertook a relatively independent analysis of the *Gore* guideposts. *Id.* at 444-45.

due process ruling only for an abuse of discretion. (App. 4a) ("[T]he district court did not abuse its discretion in declining to reduce the amount of the punitive damages"). Contrary to the careful and reasoned discussion in its contemporaneous opinion on trade dress infringement issues, the court's due process "analysis" cited no cases and failed to take even the most cursory examination of the constitutional excessiveness of the punitive damage award. Instead, the court merely observed tersely that the record supported the district court's one-sentence "findings." (App. 3a) ("The district court specifically found that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size and assets. Those findings were supported by the evidence, such that the award did not violate Cooper's due process rights.").

B. *De Novo* Review is Necessary to Ensure Effective and Consistent Enforcement of Constitutional Rights

The irreconcilable division among courts of appeal (particularly the federal circuits) over the proper standard of review threatens to undermine the rigorous enforcement of due process constraints imposed by this Court on punitive damage awards. The extent to which such awards are subject to limitation is a matter of law rooted in the federal Constitution. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993) (plurality). While the Constitution may not mandate uniformity, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in the judgment), it also does not permit the contours of the Due Process Clause to be left to the almost open-ended exercise of discre-

tion of individual juries and trial court judges.[10] Yet an abuse of discretion review does just that.

Only a *de novo* standard of appellate review provides the essential due process check against the imposition of punitive damage awards that result from bias or passion. Without such exacting and independent review, defendants (admittedly culpable ones in particular) will be far more susceptible to arbitrary awards that have little nexus to the severity of their transgression.[11] *See Haslip*, 499 U.S. at 22 (appellate review must be sufficient to "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 87-88 (1988) (O'Connor, J., concurring) (substantial and unpredictable impact of windfall recoveries from punitive damages necessitates careful scrutiny of such awards).

Nor is the distinction between a *de novo* and abuse of discretion review standard simply a matter of semantics. Defining the constitutional boundaries of punitive damages often will entail the consideration of weighty legal principles, the balancing of competing legal interests, and the evaluation of important equitable concerns. Calibrating these quintessential issues of law to the unique facts surrounding a particular dispute requires a considered assessment of the record on appeal that only comes with *de novo* review.

[10] Whatever differences may exist among the members of this Court as to the constraints that the Constitution places on punitive damage awards, there appears to be general agreement that the lower courts—including the federal circuits—must at a minimum afford defendants the full measure of procedural due process protection against punitive awards that are wholly devoid of rationality. *See Gore*, 517 U.S. at 587-88 (Breyer, J., joined by O'Connor and Souter, JJ., concurring); *Oberg*, 512 U.S. at 432 (Stevens, J., joined by Blackmun, O'Connor, Scalia, Kennedy, Souter, and Thomas, JJ.); *Alliance Resources*, 509 U.S. at 471 (Scalia, J., joined by Thomas, J., concurring in judgment).

[11] The adequacy of appellate review is also the primary basis upon which the Court has rested its conclusion that the Due Process Clause does not necessitate a high proof threshold for punitive damage awards. *See Haslip*, 499 U.S. at 23 n.11.

Deferential review under an abuse of discretion standard, on the other hand, fails to satisfy the exacting scrutiny that the Constitution demands. Petitioner, in fact, is aware of no other instance in which a claimed due process violation is reviewed on appeal under an abuse of discretion standard. Indeed, "fair notice" of the potential sanctions that may be imposed on a defendant's tortious conduct—the hallmark of the due process inquiry *vis a vis* excessive punitive damages, *Gore*, 517 U.S. at 574—is possible only if it can be said with assurance that the process accorded the defendant both at trial and on appeal protects against irrational and unpredictably excessive punitive awards.

II. Properly Applied *De Novo* Review Standard Would Have Underscored that Punitive Damages Imposed Here Contravene Petitioner's Due Process Rights

Appellate review of the jury's $4.5 million punitive damage assessment in this case under an independent, *de novo* standard would have demonstrated that the award fails in all respects to meet the minimal criteria for rationality articulated in *Gore*. Not only is this figure *ninety* times the purely economic harm to which plaintiff was exposed, but it arose in a case in which much of Cooper's conduct was deemed "inadvertent" and only technically tortious in nature. (App. 3a-4a, 31a). In addition, the jury's punitive award, and the district court's summary approval thereof, were no doubt colored in large part by a belief that Cooper's underlying act of copying the PST was unlawful. Although the Ninth Circuit explicitly repudiated that belief in its vacatur of the trade dress infringement verdict, no adjustment was made for the error in its due process conclusion. In short, the abuse of discretion prism through which the Ninth Circuit conducted its punitive damages review allowed it to pay only lip-service to

the *Gore* guideposts, and, precisely because the appellate process failed to undertake a proper inquiry, enabled the award to escape the constitution's due process safeguards.

A. Faithful Application of *Gore* Guideposts Compels Reduction of Punitive Damage Award

This Court held in *Gore* that punitive damages which are "grossly excessive" in relation to a "State's legitimate interests in punishment and deterrence" enter a "zone of arbitrariness" that violates the Due Process Clause. 517 U.S. 568. The Court added that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574.

To effectuate these general principles, the Court identified three "guideposts" to steer the due process analysis: (1) the "degree of reprehensibility" of the defendant's conduct; (2) the ratio between the punitive damage award and "the actual harm inflicted on the plaintiff;" and (3) the relationship between the punitive damage award and "the civil or criminal penalties that could be imposed for comparable misconduct." *Id.* at 575, 580, 583. While reaffirming its prior reluctance to demarcate any bright lines in establishing limits on constitutionally permissible punitive damage awards, *id.* at 585-86, the Court emphasized the need for legal standards that permit meaningful appellate review of the reasonableness and rationality of such awards. *Id.* at 587 (Breyer, J., concurring). *De novo* review by the court of appeals alone accomplishes that result. *See supra* at 11-13.

1. Reprehensibility of Defendant's Conduct

The most important component in the constitutional excessiveness inquiry is the flagrancy of the defendant's misconduct. *Id.* at 575 & n.23. Certain transgressions are more harmful than others and the presence of deceit and repeated wrongdoing is naturally deemed more reprehensible than mere negligence and isolated malfeasance. *Id.* at 575-76; *Alliance Resources*, 509 U.S. at 462 n.28. The ultimate touchstone is whether the punitive damages imposed upon the defendant "reflect 'the enormity of his offense.'" *Gore*, 517 U.S. at 575 (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1852)).

Cooper's conduct in the instant action bore none of "the aggravating factors associated with particularly reprehensible conduct." *Id.* at 576. First, as was the case in *Gore*, the harm inflicted on Leatherman was entirely economic in nature. *Id.* Leatherman's only damages were the PST sales it purportedly lost to consumers purchasing Cooper's Toolzall. More specifically, by marketing its Toolzall with promotional materials depicting a modified PST, Cooper was able to compete more rapidly with Leatherman than if it had delayed preparing its advertisements until the first Toolzalls rolled off the production line. These damages, calculated in the form of Cooper's gross profits on the Toolzall, amounted to approximately $50,000. (ER 751; Instruction 36).

Although Leatherman argued it sustained certain non-economic damages as well, the Ninth Circuit found this claim did not ring true. In particular, the court determined that there was no legal relationship between Cooper's advertisements and any alleged impairment of Leatherman's reputation. The court stated:

> [T]his is a very unusual passing off case. Typically, one who engages in passing off is attempting to persuade the customer that an unknown or inferior product being sold actually *is* a famous or superior

product of another. It would also be passing off in a traditional sense if Cooper showed customers *physical* samples of PSTs and then shipped Toolzalls to customers after they placed orders based on examining the PST samples. In that case, Cooper would be using the actual qualities of the PST to obtain the sales of Toolzalls.

Here, even assuming PST is a superior product, there is nothing to suggest that any superior qualities were *perceivable* in the photographs. Any customer who bought based on what the photograph *showed* would have received essentially that for which he or she paid. Thus, Cooper's use of the photographs of the PST does not involve the same sort of potential harm to Leatherman or to customers as that which may arise from traditional passing off.

(App. 3a-4a) (emphasis in original).

It is equally critical that, as the Ninth Circuit held in vacating the jury's trade dress infringement verdict, Cooper acted well within its legal rights in copying Leatherman's unpatented, wholly functional PST. (App. 16a). Any suggestion, therefore, that Toolzall sales diminished consumer confidence in either the PST or the Leatherman brand name is completely irrelevant for purposes of the damages calculus on the false advertising/"passing off" claims. The only relevant damages on these common law causes of action are those emanating from misrepresentations in the photos. It is essentially undisputed that such damages were *de minimis* inasmuch as the relatively small number of individuals who purchased a Toolzall before Cooper voluntarily took the device off the market received a tool with no material differences from the product pictured in the controverted ads.

As for Cooper's other purportedly reprehensible act—failing to ensure that no modified PST photo appeared in any Toolzall promotional materials following the December, 1996 preliminary injunction—the district court itself characterized Cooper's omission as "inadvertent." (App. 31a). Not

only did the injunction not require a recall of any advertisements that already had been distributed, but the undisputed visual similarities between the Toolzall and PST rendered the products difficult to distinguish. Moreover, as soon as Cooper learned from Leatherman that its resellers/distributors were continuing to use promotional materials subject to the preliminary injunction, Cooper promptly directed them to cease such practices. (Tr. 906-08).

The jury's determination that Cooper acted with malice, of course, must be respected. But in assessing the magnitude of the admitted wrongdoing, the fact that Cooper had removed the Toolzall from the market at the time of its post-injunction advertising, combined with the fact that the brief use of the post-injunction ads by Cooper's resellers/distributors posed no harm to Leatherman (economic or otherwise), greatly minimizes the reprehensibility of the misconduct. *See Gore*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award.").

The Ninth Circuit disturbingly declined to consider any of these points. Instead, it perfunctorily affirmed the district court's one-sentence disposal of the constitutional excessiveness issue, (App. 24a), by glibly characterizing the matter as one falling within the district court's discretion. (App. 3a, 4a). Not only was the ultimate result inequitable towards Cooper, but the deferential review solidified the arbitrariness and unpredictability of punitive damage awards.

2. Ratio of Punitive Damages to Compensatory Damages

Exacerbating the deficiency of the Ninth Circuit's review was its refusal to examine the second important indicator of punitive damages' constitutional legitimacy, namely the ratio of the award to the actual harm sustained by the

plaintiff. *Gore*, 517 U.S. at 580. While this Court has steadfastly, and perhaps sensibly, refused to impose any rigid mathematical formula for evaluating reasonableness, it has referenced some inchoate outer thresholds. The Court pointed out in *Haslip*, for example, that a punitive damage award of more than four times the plaintiff's out-of-pocket expenses was "close to the line." 499 U.S. at 23. The Court later clarified that a ten-to-one ratio was permissible where both the potential, as well as actual, harm from the defendant's conduct was taken into account. *See Alliance Resources*, 509 U.S. at 462. But the Court invalidated, as "breathtaking," the punitive damages award in *Gore* that was five hundred times the amount of the plaintiff's actual damages. 517 U.S. at 582-83.

To be sure, the Court has suggested that higher ratios may be warranted if, unlike here, a particularly egregious act results in only a small amount of compensatory damages, or if, again unlike here, a plaintiff's injury and resulting noneconomic harm are difficult to detect. *Id.* at 582. This dicta, however, cannot serve as a repository for virtually unfettered discretion in crafting an appropriate punitive damage award. There must be reasonable and predictable restrictions on such awards if defendants are to enjoy the type of notice of potential punishment that the Due Process Clause affords them. To hold otherwise merely heightens the constitutional mischief already inherent in exemplary damages.

There is no precedent in this Court to support the 90:1 punitive to compensatory damages ratio imposed in the case at bar. Not only did Cooper readily admit to the impropriety of its actions and take prompt remedial action by voluntarily removing its Toolzall from the marketplace, but Leatherman suffered only minimal harm from Cooper's conduct. Nor was there any potential that Leatherman might have suffered additional harm under different circumstances. In short, to characterize Leatherman's purely economic $50,000 injury as "reasonably related" to the punitive award of $4.5 million, "is to empty the 'reasonable relationship' test of meaningful content." *Gore*, 517 U.S. at 590 (Breyer, J., concurring).

3. Comparable Civil Penalties

The third and final ingredient in the constitutional excessiveness inquiry, which the Ninth Circuit also avoided discussing, is the comparable civil or criminal sanctions that could be imposed for similar misconduct. *Id.* at 583. The only provision even remotely relevant here is Or. Rev. Stat. § 646.642(1) (1999), which authorizes the state to seek civil penalties of $25,000 from any party who "willfully" violates the terms of an injunction entered pursuant to Oregon's Unlawful Trade Practices statute. Even if the State of Oregon had secured the injunction at issue here, section 646.642(1) would have no applicability because, as the district court observed, Cooper's post-injunction improper advertisements were "inadvertent." (App. 31a). The jury's finding of maliciousness on the part of Cooper was predicated on conduct pre-dating the imposition of the preliminary injunction. Put simply, there was no "willful" violation of an injunction.

In sum, the proper application of the *Gore* guideposts inescapably compels a substantial reduction in the approved punitive damage award. In direct contravention of the oft-repeated edict set down by this Court, *see Gore*, 517 U.S. at 574 & n.22; *Haslip*, 499 U.S. at 22; *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280-81 (1989) (Brennan, J., concurring), the exemplary damages imposed are wholly disproportionate to the character and degree of Cooper's openly-admitted transgressions. Cooper had no advance notice that it was susceptible to such an award, and its due process rights were accordingly violated. Such an award never would have survived an independent and meaningful appellate review for reasonableness.

B. Deferential Appellate Review Invites Nullification of Due Process Safeguards

This case represents far more than just another Ninth Circuit panel cast adrift. It is a testament to the grave dan-

gers that lurk—most specifically, arbitrary and unduly excessive punitive damage awards—if constitutional rights are not carefully scrutinized in the form of *de novo* appellate review. As is painfully evident here, an extraordinarily deferential review standard invites judicial nullification of the guideposts established in this Court's due process jurisprudence. If the Due Process Clause's protection against grossly excessive punitive damages is to be anything more than mere empty words, individual juries and trial judges must not be delegated virtually unbridled power to define the scope of this most fundamental right.

The risks are magnified further when one considers the gaping judicial cleavages between excessive and reasonable punitive damage awards. The often erratic fluctuations emanate from shared moral judgments that are excruciatingly difficult to translate into dollar figures. *See* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2074 (1998). The inevitable result is that punitive awards, while cloaked as the byproduct of reasoned analysis, frequently amount to little more than the collective caprice of outraged jurors and trial judges. No one suggests, of course, that appellate judges are somehow able to consult their oracle of knowledge and isolate the exact figure necessary to punish and deter a defendant's misconduct. But their dispassionate application of the constitutional standards governing punitive damages, accentuated by an acute awareness of similarly situated appellate courts' treatment of the issue, nurtures an environment of predictability and reasonableness. And as Justice Breyer has noted, it is "the uniform general treatment of similarly situated persons that is the essence of the law itself." *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2000

APPENDIX

LEATHERMAN TOOL GROUP, INC., an Oregon corporation, Plaintiff-Appellee,

v.

COOPER INDUSTRIES, INC., an Ohio corporation, Defendant-Appellant

Nos. 98-35147, 98-35415

United States Court of Appeals for the Ninth Circuit

Argued and Submitted May 4, 1999 -- Portland, Oregon

Filed December 17, 1999

Appeals from the United States District Court for the District of Oregon (Malcolm F. Marsh, District Judge, Presiding)

MEMORANDUM[1]

Before: WILLIAM C. CANBY, JR. and THOMAS G. NELSON, Circuit Judges, and JEREMY FOGEL,[2] District Judge.

FOGEL, District Judge:

In a published opinion filed herewith, we have reversed that portion of the judgment below that granted plaintiff Leatherman Tool Group, Inc. an injunction against de-

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[2] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

fendant Cooper Industries, Inc. In this memorandum we will address Cooper's remaining contentions on appeal. We will affirm the punitive damage award and remand for further consideration of the attorneys' fees' award.

I.

A. Punitive Damages

The parties are familiar with the facts so we will not recite them here. Cooper challenges the punitive damages awarded against it as unauthorized under the Oregon Constitution and as violative of due process. We take each argument in turn.

1. The Oregon Constitution

The district court's interpretation of state law is reviewed de novo. *See Omega Envtl, Inc. v. Gilbarco, Inc.*, 127 F. 3d 1157, 1161 (9th Cir. 1997). Article I, Section 8, of the Oregon Constitution provides, "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatsoever, but every person shall be responsible for the abuse of that right." Oregon courts have held that this provision precludes punitive damages (but permits compensatory damages) for torts which impose liability for speech. *See Huffman & Wright Logging Co. v. Wade*, 857 P.2d 101 (1993).

In *Smallwood v. Fisk*, 934 P.2d 557 (1997), however, the court made clear that the prohibition on punitive damages does not apply where the speech in issue "is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* at 559 (citation omitted).

Smallwood proceeded to hold that fraud falls within such a historical exception. *See id.* at 560-61. Here, Cooper was found liable for misrepresenting that a modified PST was made by Cooper. Although the precise theory of liability differed slightly from the ordinary fraud at issue in *Smallwood*, no meaningful distinction can be drawn. Accordingly, punitive damages were not forbidden by the Oregon Constitution in this action.

2. Due Process

The district court specifically found that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size and assets. Those findings were supported by the evidence, such that the award did not violate Cooper's due process rights.

We note that even though the jury's finding that Cooper engaged in passing off is supported by substantial evidence and is not challenged on appeal, this is a very unusual passing off case. Typically, one who engages in passing off is attempting to persuade the customer that an unknown or inferior product being sold actually *is* a famous or superior product of another. It would also be passing off in a traditional sense if Cooper showed customers *physical* samples of PSTs and then shipped Toolzalls to customers after they placed orders based on examining the PST samples. In that case, Cooper would be using the actual qualities of the PST to obtain the sales of Toolzalls.

Here, even assuming PST is a superior product, there is nothing to suggest that any superior qualities were *perceivable* in the photographs. Any customer who bought based on what the photograph *showed* would have received essentially that for which he or she paid. Thus, Cooper's use of the

photographs of the PST does not involve the same sort of potential harm to Leatherman or to customers as that which may arise from traditional passing off.

We do not, however, intend to condone the conduct. It was literal passing off and at a minimum, it gave Cooper an unfair advantage by allowing it to use the sweat of Leatherman's efforts to obtain a "mock-up" more cheaply, easily, and quickly than if it had started from scratch or waited until samples of its own product were ready. Additionally, there was evidence that Cooper did not act promptly to remedy the problem even after an injunction issued, which suggests an indifference to legal consequences. Accordingly, the district court did not abuse its discretion in declining to reduce the amount of punitive damages.[3]

B. Attorneys' Fees

Section 35 (a) of the Lanham Act permits attorneys' fee awards in "exceptional cases." 15 U.S.C. § 1117 (a). An award of attorneys' fees under the Lanham Act is reviewed for abuse of discretion. *See Stephen W. Boney, Inc. v. Boney Services, Inc.*, 127 F. 3d 821, 827 (9th Cir. 1997). The district court cited *Boney* for the proposition that "exceptional" includes cases where the "infringement is malicious, fraudulent, deliberate, or willful." The district court proceeded to find that Cooper's conduct met that standard, and that Cooper's "strong functionality argument" was insufficient to prevent the fee award, because Cooper "took a calculated risk in pursuing the Toolzall design."

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[3] Cooper also argues the punitive award violates Oregon law which requires a finding of malice to support punitive damages. On the agreed-to verdict form, the jury found malice or reckless and outrageous indifference. That finding is supported by the evidence in connection with the passing off.

Because we have concluded Leatherman had no protectable trade dress in the PST, conduct related to copying it no longer can serve as a basis for the award of attorneys' fees. We therefore remand to give the district court the opportunity to consider whether the evidence as to the passing off claim, standing alone, is sufficient to warrant the award or some lesser award.[4]

II.

The portion of the judgment awarding punitive damages is AFFIRMED. The matter is REMANDED to the district court for reconsideration of the award of attorneys' fees.

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[4] We note that the jury verdict form did not ask the jury to distinguish between passing off as a Lanham Act violation and passing off under state law. On remand, the district court should first determine whether there was any Lanham Act component of the jury verdict to support any fee award.

LEATHERMAN TOOL GROUP, INC., an Oregon corporation, Plaintiff-Appellee,

v.

COOPER INDUSTRIES, INC., an Ohio corporation, Defendant-Appellant

Nos. 98-35147, 98-35415

United States Court of Appeals for the Ninth Circuit

Argued and Submitted May 4, 1999 -- Portland, Oregon

Filed December 17, 1999

Appeals from the United States District Court for the District of Oregon (Malcolm F. Marsh, District Judge, Presiding)

John D. Vandenberg, David J. Earp and Garth A. Winn, Klarquist Sparkman Campbell Leigh & Whinston, Portland, Oregon, for the defendant-appellant.

J. Peter Staples, Julianne Ross Davis and Bruce W. DeKock, Chernoff, Vilhauer, McClung & Stenzel, Portland, Oregon, for the plaintiff-appellee.

Before: WILLIAM C. CANBY, JR. and THOMAS G. NELSON, Circuit Judges, and JEREMY FOGEL,[1] District Judge.

Opinion by Judge Fogel

[1] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

FOGEL, District Judge:

In this case we must decide when and to what extent the overall appearance of a non-patented product is protectable as "trade dress." Plaintiff Leatherman Tool Group, Inc. ("Leatherman") was first to market with an admittedly ingenious multi-function pocket tool which improves on the classic "Swiss army knife" in a number of respects. Not the least of the improvements was the inclusion of pliers, which, when unfolded, are nearly equivalent to regular full-sized pliers. Leatherman sells its tool under the name "Pocket Survival Tool" ("PST").[2] Leatherman apparently largely created and undisputedly now dominates the market for multifunction pocket tools which generally resemble the PST.

Defendant Cooper Industries, Inc. ("Cooper") owns numerous famous tool industry brand names including "Crescent"; it is best known for the Crescent adjustable wrench which was copied widely by other toolmakers in the early part of the 20th century. There is no dispute that at some point Cooper became aware of the PST and of Leatherman's market dominance and set out to compete in that market. There also is no dispute that at a trade show in 1996, Cooper announced a multi-purpose tool which differed in appearance from the PST in only three respects: 1) the Cooper tool was marked with a different name than the PST, 2) the fasteners which held the Cooper tool together differed from the PST fasteners, and 3) the Cooper tool included a serrated blade and certain other small but not particularly visible differences. During development, Cooper internally referred to its competing tool as the "Cooperman." When it was announced, Cooper called its tool the Crescent "Toolzall" (hereinafter "the original Toolzall" or "the Toolzall").

[2] Leatherman sells other models of multifunction tools which differ in size and functions. Those tools are not at issue in this litigation.

After the trade show, Leatherman filed this action and obtained a preliminary injunction prohibiting Cooper from marketing the original Toolzall. Cooper thereafter developed and marketed a version of the Toolzall ("the second Toolzall") which differed more from the PST. Cooper moved for judgment as a matter of law on Leatherman's trade dress claim, arguing that Leatherman did not provide the "entire design" of the PST was nonfunctional. The district court denied Cooper's motion.

This action then proceeded to trial by jury. The jury found that the overall appearance of the PST was protectable trade dress and that the original Toolzall infringed that trade dress. The jury found that the second Toolzall did not infringe the trade dress of the PST.

The jury awarded no damages as to the trade dress infringement. Pursuant to the finding of infringement, however, the district court entered a permanent injunction precluding Cooper from marketing the original Toolzall. Cooper therefore has appealed that portion of the judgment.

We conclude that the district court should have granted Cooper's motion for judgment as a matter of law on Leatherman's trade dress claim and therefore we reverse the judgment in part. In an unpublished memorandum filed herewith, we affirm the jury's award of damages on certain other claims and remand for further consideration the question of whether those other claims support an award of attorneys' fees absent trade dress infringement.

I.

"The standard of review for the denial of a motion for judgment as a matter of law after a jury trial is the same as the standard of review for reviewing a jury's verdict: 'both the verdict and the denial of the motion must be affirmed if

there is substantial evidence to support the verdict.'" *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999) (quoting *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370-71 (9th Cir. 1987)).

II.

Leatherman claimed, and the jury found, a protectable trade dress in "the overall appearance" of the PST.[3] Leatherman asserts that the protectable appearance includes:

> [T]he combination of multiple features, including: the tool size; the shape of the handles; the shape of the gripping jaws including the selection, shape and placement of the gripping jaw features (needlenose, arcuate gripping surface and cutters); the mirror image of the tool handles; the brushed stainless steel finish on the handles; the selection, arrangement and shape of all of the various tool blades both individually and collectively; the combination and arrangement of all the above features; the proportional sizes of components in relation to each other; and, the

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[3] Cooper contends it was prejudiced when on the last day of the trial the district court changed the previously agreed-to phrase "entire design" to "overall appearance" in two jury instructions. Cooper appears to understand "entire design" to mean something different from the "overall appearance." Although "design" and "appearance" are not fully synonymous, we have trouble seeing a meaningful distinction in this context. Whether one says "entire design" or "overall appearance" the basic connotation is "what the product looks like, viewed as a whole."

It appears Cooper may be trying to say that when all of a product's features, including features like size, shape, texture, materials, combinations and placement of elements, etc., are chosen as a matter of *engineering* design in a functional product, then there simply is no nonfunctional aspect to the "overall appearance" of the product. With this concept we agree, as set forth in more detail below.

> type and appearance of the pivot joint on the pliers head.

At first blush it would appear easy to conclude that the jury's finding of trade dress infringement is supported by substantial evidence. Cooper acknowledges it copied the overall appearance of the PST almost exactly. There is no dispute that one must look fairly closely at the products to distinguish them. The fact that Cooper could have chosen to use an appearance which more visibly distinguishes its product from the PST is confirmed by the jury's finding that the second Toolzall did *not* infringe.

To uphold a finding of infringement here, however, would suggest that the general appearance of almost any unpatented product rarely if ever could be copied faithfully.[4] That is not the law. Rather, "[t]he physical details and design of a product may be protected under the trademark laws only if they are nonfunctional . . . ." *Clamp Manufacturing Co., Inc. v. Enco Manufacturing Co., Inc.*, 870 F.2d 512, 515 (9th Cir. 1989) (citing *Vuitton Et Fils S.A. v. J. Young Enterprises*, 644 F.2d 769, 772 (9th Cir. 1981)). The *Clamp* court went on to explain:

> The requirement of nonfunctionality is based "on the judicial theory that *there exists a fundamental right to compete through imitation of a competitor's product*, which right can only be temporarily denied by the patent or copyright laws." *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 1336 (C.C.P.A. 1982) (emphasis in original). If the utilitarian aspects of the product are its essence, only patent law protects its configuration from use by competitors. *See Morton-Norwich*, 671 F.2d at 1338-40; *cf. Vuitton*, 644 F.2d at 776-77. "Functional features of a product are *features which constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored, or endorsed a product*." *Vuitton*, 644 F.2d at 774. For an overall product configuration to be recognized as a trademark, the entire design must be nonfunctional. *Textron, Inc. v. U.S. Int'l Trade Comm'n*, 753 F.2d 1019, 1025 (Fed. Cir. 1985). "*[T]he right to copy better working designs would in due course, be stripped of all meaning if overall functional designs were accorded trademark protection because they included a few arbitrary and nonfunctional features.*" *Id.*

Id. at 516 (some internal citations omitted, italics in original, underscoring added).[5]

The *Textron* court further explained an important difference between "de facto" and "de jure" functionality:

> In essence, de facto functional means that the design of a product has a function, i.e., a bottle of any design holds fluid. De jure functionality, on the other hand, means that the product is in its particular shape *because it works better in this shape* . . . . [B]efore an overall product configuration can be

[4] Some cases use the term "slavishly copied." We use the term "faithfully copied" to mean the same thing, i.e., copying to the extent that few if any differences in appearance are readily noticeable, whether or not differences in quality or other differences are discernable on close inspection.

[5] The *Clamp* court ultimately upheld the trial court's finding of trade dress infringement, albeit with reluctance. *See* 870 F.2d at 516-17. Nothing in the opinion or in the district court opinion in that case, 5 U.S.P.Q.2d 1643, discloses exactly what the nonfunctional features of the product were.

> recognized as a trademark, the entire design must be arbitrary or non de jure functional.

Textron, Inc. v. U.S. Int'l Trade Comm'n, 753 F.2d at 1025 (citations omitted, emphasis added, emphasis in original omitted).

In *Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*, 40 F.3d 1431 (3d Cir. 1994), the court identified additional issues with alleged trade dress lying solely in "product configuration."

> Of course, it is not the purpose of unfair competition law, under the guise of either consumer protection or the protection of business good will, to implement a policy of encouraging innovative designs by protecting them once designed. Those issues are the province of copyright and patent laws. Moreover, design protection laws (which have repeatedly been introduced in Congress during virtually every session since 1917) have not once been enacted. *See Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 n. 12 (D.C. Cir. 1978) (observing that since 1914 none of the approximately 70 design protection bills introduced in Congress had passed); Brown, *Design Protection: An Overview*, 34 UCLA L.REV. at 1395 ("Beginning in 1957, a [design protection] bill has been introduced in probably every Congress. . . ."); Dratler, *Trademark Protection for Industrial Designs*, 1988 U.ILL.L.REV. at 888 & n. 4, 904 & n. 94 (stating that the history of the effort to have Congress enact industrial design legislation takes up 160 pages in a Copyright Office bibliography, and that between 1914 and 1945 at least 45 such bills were introduced in Congress).

> . . . . We believe that courts should exercise restraint so as not to undermine Congress's repeated determinations not to afford virtually perpetual protection to product configurations with an expansive construction of section 43(a). What Congress has, for the great span of this century, been unwilling to do, . . . should not be effected by the judiciary.

40 F.3d at 1446-47 (some internal citations and footnote omitted).

Several other courts have noted that it is, and should be, more difficult to claim product configuration trade dress than other forms of trade dress. *See, e.g., Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 379 (2d Cir. 1997). ("[T]his circuit appears to be moving toward a rule that packaging is usually indicative of a product's source, while the design or configuration of the product is usually not so."); *Versa Products Company, Inc. v. Bifold Co. (Manufacturing) Ltd.*, 50 F.3d 189, 207-08 (3d Cir. 1995) (holding that deliberate intent to copy does *not* support finding a likelihood of confusion in product configuration cases unless a "product's labeling and marketing are also affirmatively misleading").[6]

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[6] We note that the circuits are split as to whether product configuration cases are different conceptually from ordinary trademark or trade dress cases. *See Ashley Furniture Industries, Inc. v. Sangiacomo N.A. Ltd.*, 187 F.3d 363, 370-73 (4th Cir. 1999) (criticizing *Duraco*). The focus of the split, however, is what it takes for a trade dress to be "inherently distinctive" and whether the traditional categories of generic, descriptive, suggestive, arbitrary, and fanciful can be applied meaningfully in product configuration cases. *See id.* Because this case does not present those issues squarely, we do not decide them. We hold only that in a product configuration case there must be some aspect to the configuration which is nonfunctional, a premise with which even the *Ashley Furniture* court would appear to agree. *See id.* at 375-76 (arguing that the

With these standards in mind, it becomes apparent that there is no evidence in the record which supports the jury's conclusion that the overall appearance of the PST is protectable trade dress. To be sure, the PST has an appearance, as every physical object must. There is no evidence, however, that anything about that appearance (other than the Leatherman name) exists for any non-functional purpose. Rather, every physical part of the Leatherman is de jure functional. No witness pointed to any feature of, or marking on, the PST (other than the Leatherman name) which was ornamental or intended to identify its source. Rather, the evidence showed, as in *Textron*, that "the product is in its particular shape *because it works better in this shape*." 753 F.2d at 1025 (emphasis added). Indeed, the designer of the PST repeatedly testified as to his belief in the truth of Leatherman's claims as to the superiority of the PST design.

Leatherman is correct that trade dress must be viewed as a whole, but where the whole is nothing other than the assemblage of functional parts, and where even the arrangement and combination of the parts is designed to result in superior performance, it is semantic trickery to say that there is still some sort of separate "overall appearance" which is nonfunctional. If it is permissible to draw a distinction between such an object and its "general appearance," then virtually nothing is utilitarian, and virtually the only product designs which could be copied faithfully are those which are widely used and therefore in the public domain. Such a result would

requirement of nonfunctionality is sufficient to protect the right to compete). As a practical matter, though, it may often be difficult to show that the configuration of a useful product is not functional. As the issue would be less likely to arise with product packaging, and could not arise with respect to a trademark, it is fair to say that it may be more difficult to establish protectable rights in product configuration cases, even assuming the legal concepts and standards otherwise are no different.

be wholly inconsistent with the principles and authorities discussed above.

Nor can the fact that there are many other multifunction tools with a variety of appearances (including the second Toolzall) preclude Cooper from faithful copying of the PST. While it is appropriate to look to possible alternatives when judging whether a design is functional, the evidence here was unequivocal that none of the alternatives offered the same functionality as the PST. Even though many of the tools likely are highly functional and useful, none of them offer *exactly* the same features as the PST. For example, a particular alternative design might be substantially larger than the PST. As such, it might actually be *preferred* by a customer seeking a heavier-duty tool to keep in the car. A customer looking for a tool to carry in a pocket every day, though, might prefer the compactness of the PST.[7] Leatherman does not have the right to preclude competition in any particular subset of the overall market.

Leatherman relies on an unreported district court case, and three cases cited by that case, for the proposition that in analyzing whether there are viable alternative designs, courts should look to "broadly defined product lines." The published cases are *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2nd Cir. 1987); *In re DC Comics, Inc.*,

[7] Indeed, Leatherman itself apparently sells a multifunction tool which is even smaller than the PST and which presumably has resulting advantages and disadvantages. That tool necessarily has a different appearance and it may demonstrate that alternative designs may be able to find a viable economic niche. Nevertheless, Leatherman does not have rights under trade dress law to compel its competitors to resort to alternative designs which have a different set of advantages and disadvantages. Such is the realm of patent law. For this reason, trial testimony from Cooper's engineers and others that a tool with a different appearance could be just as useful as the PST does not support the verdict.

689 F.2d 1042 (C.C.P.A. 1982); and *Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327 (2nd Cir. 1983).

In *Warner Brothers*, the court rightly rejected an argument that labels on a toy car which allowed children to *identify* it as a "Dukes of Hazzard" car were "functional." *See* 724 F.2d at 330-32. *DC Comics* involved a party's attempt to register drawings of certain comic characters as trademarks for dolls of the same characters. In concluding that registration would not allow a monopoly on dolls in general, the court understood that the appearances of the comic book characters in issue were fanciful and not utilitarian in any respect. *See* 689 F.2d at 1045. In *Brandir*, the court stated it would be appropriate to *examine* a broad product line, but nothing therein suggested that after examination one could not conclude that widely different products did not fulfill the same functions, or fulfill them as well. *See* 834 F.2d at 1148. To the extent anything in *Brandir* suggests that a product feature is nonfunctional if there is *any* alternate design that competes to *any* degree, it is inconsistent with the purpose and extent of the functionality doctrine described above.

Accordingly, even viewing the evidence in the light most favorable to Leatherman, the only reasonable conclusion is that the overall appearance of the PST is not protectable as trade dress, at least as against a competitor which clearly marks its own product with a distinct name and who uses distinct packaging. Since there is no dispute that Cooper marked and packaged the Toolzall distinctively, judgment as a matter of law should have entered in its favor.[8]

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[8] In view of this conclusion, we do not reach Cooper's argument that the district court erred in granting partial summary judgment to Leatherman regarding Cooper's argument that the overall appearance of the PST had been disclosed in certain patent applications.

III.

The portion of the judgment that grants Leatherman a permanent injunction is REVERSED. No costs are allowed.

LEATHERMAN TOOL GROUP, INC., Plaintiff-Appellee,

v.

COOPER INDUSTRIES, INC., Defendant-Appellant

Nos. 98-35147, 98-35415

United States Court of Appeals for the Ninth Circuit

March 3, 2000

ORDER

Before: CANBY, JR. and T.G. NELSON, Circuit Judges, and FOGEL,[1] District Judge.

The panel has voted to deny Appellant's petition for rehearing. Judge T.G. Nelson has voted to deny the petition for rehearing en banc and Judge Canby and Judge Fogel so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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[1] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

LEATHERMAN TOOL GROUP, INC., Plaintiff

v.

COOPER INDUSTRIES, INC., Defendant

CV No. 96-1346-MA

United States District Court for the District of Oregon

November 17, 1997

JUDGMENT

MARSH, Judge.

On October 17, 1997, a jury returned a verdict finding that plaintiff established trademark rights in the overall appearance of the Leatherman Pocket Survival Tool (LPST) and that defendant's original ToolZall infringed the LPST. The jury rejected plaintiff's claim that the re-designed ToolZall tool (modified to include plastic coated handles) infringed plaintiff's LPST trade dress. The jury found that plaintiff had sustained no damages relative to its trade dress infringement claim.[1] In addition, the jury found that plaintiff had established its common law claims for passing off, false advertising and unfair competition relative to a claim that defendant used an LPST as a mock-up for some of its early advertising for the ToolZall. The jury awarded $50,000 in actual damages and $4.5 million in punitive damages for the common law claims.

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[1] In December of 1996, shortly following the ToolZall's introduction, I entered a preliminary injunction against domestic sales of the ToolZall.

During a pretrial conference, I conferred with the parties and determined that the issue of any permanent equitable relief would be taken up post-trial. In post-trial briefing, plaintiff seeks a permanent injunction against sales of the original ToolZall in both the U.S. and over 70 foreign countries, the destruction of ToolZall component parts and an increase in actual damages relative to its common law claims and damages on foreign sales. Other than the domestic injunction, defendant opposes each request and argues that the jury's punitive damage award must be set aside as "grossly excessive" and/or in violation of Oregon's constitutional prohibition against punitive damages as applied to speech related activities.

As for the extra-territorial injunction, defendant argues that such a holding would violate its Seventh Amendment jury trial rights. However, I find that this issue was raised pretrial and it was with the understanding that both the entry and scope of a permanent injunction would be taken up post-trial. Based upon that understanding, I precluded plaintiff from proffering any evidence relative to foreign sales activities. I agree, however, that plaintiff's claim for damages from foreign sales exceeds the scope of that limited understanding and thus, my consideration will be limited to those equitable remedies specifically raised during the pretrial conference.

The parties have not cited, nor have I been able to find a case precisely on point relative to the entry of a permanent injunction against foreign sales following a successful jury verdict on a trade dress claim relative to domestic sales. Both parties agree, however, that the standards set forth in *Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500 (9th Cir. 1991) governs the issue of the appropriateness of an injunction against foreign sales activities. In *Ocean Garden*, plaintiff and defendant were U.S. corporations engaged in the marketing of canned seafood products distrib-

uted for export to the Far East. *Id.* at 501. The defendant distributed products solely in the Far East. On appeal, defendant argued that the district court lacked jurisdiction to control is activities in foreign countries and thus, erred in entering a preliminary injunction. The court upheld the preliminary injunction, finding that the Lanham Act was broad enough to encompass such conduct. In reaching this conclusion, the court relied upon the following three-part test:

> "(1) there must be some effect on American foreign commerce; (2) the effect must be sufficiently great to present a cognizable injury to plaintiffs under the federal statute; [and] (3) the interest of an links to American foreign commerce must be sufficiently strong in relation to those of other nations."

Id. at 503. The court held that the sales of infringing goods in foreign countries with a financial impact in the U.S. were sufficient to satisfy the first two "effects" elements of the test. *Id*; *see also Winterland Concessions Co. v. Fenton*, 835 F. Supp. 529, 531 (N.D. Cal. 1993). In analyzing the third factor which requires a comparison of U.S. versus foreign interests, the Ninth Circuit examined the following seven subfactors:

(1) the degree of conflict with foreign law;

(2) nationality of the parties;

(3) whether enforcement could be effective;

(4) the relative significance of the effects on the U.S. as compared against effects in the foreign countries;

(5) whether there is any evidence that defendant expressly intended to harm U.S. commerce;

(6) foreseeability of the U.S. effects; and

(7) the relative importance of the violations within the U.S.

Ocean Garden, 953 F.2d at 503-04.

The court held that where there were no pending legal proceedings in the foreign countries regarding the same subject matter, where both parties were U.S. corporations, where the defendant's activities were "orchestrated" from the U.S., where the infringement was intentional and where the goods were exported from the U.S. through a foreign trade zone, the district court's exercise of extraterritorial jurisdiction was justified. *Id.* The court then went on to examine the merits of the case and found, based in part upon evidence of confusion in the foreign countries affected by the injunction, that plaintiff had established a high likelihood of success on the merits. *Id.* at 506.

Defendant argues that plaintiff must establish that it has protectable trade dress rights in each country in which it seeks to extend the injunction. However, defendant provides no citations for such a proposition. I found no such legal requirement and what little I have found indicates that the burden is upon the defendant to show that it has a superior right in a foreign country to prevent the imposition of an injunction. In *Totalplan Corp. Of America v. Colborne*, 14 F. 3d 824, 831 (2d Cir. 1994), the court found that an extraterritorial injunction should lie "in countries were both parties were marketing their goods and the defendant had not established a superior right to use its mark." *See also Ocean Garden*, 953 F.2d at 503 (noting absent determination that defendant had superior rights, no conflict with foreign country existed), *citing American Rice, Inc. v. Arkansas Rice Growers Cooperative Ass'n*, 701 F.2d 408, 415-16 (5th Cir. 1983)

Plaintiff has come forward with evidence (in Roger Bjorklund's declaration) that Cooper's foreign sales have impacted plaintiff's revenues in the U.S. Plaintiff provides a listing of countries in which LPSTs have been exported (Ex. 194) and claims that Cooper has sold the original ToolZall in "many" of the same foreign countries. Plaintiff has failed to identify which foreign countries Cooper has entered with the original ToolZall, however, plaintiff confirms that it is the prior user in each territory identified.

Cooper is a U.S. company and it is undisputed that its original ToolZall products are made in the U.S. (Georgia) and exported to foreign countries through North Carolina. Thus, enforcement could be effective here in the U.S. There is also no evidence of any pending legal proceedings in any foreign countries such that the imposition of an injunction would interfere or conflict with another country's sovereign interests. Finally, there is unrefuted evidence that defendant intentionally copied the LPST (whether in good or bad faith), intending to carve out a portion of Leatherman's market share. Thus, I find that the exercise of extra-territorial jurisdiction is proper in this case.

However, in reviewing plaintiff's list of 71 foreign countries in which the LPST has established prior rights, many of the sales in these countries have been de minimis. For example, the sale of a single tool in Russia in 1994 cannot be said to have a significant effect upon plaintiff's U.S. revenues. Of those countries listed, only 22 involve sales of a significant enough amount to justify the imposition of an injunction. These countries are as follows:

> Australia, Austria, Canada, Denmark, Finland, France, Germany, Hong Kong, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Saudi Arabia, Singapore, Spain, Sweden, Switzerland, South Africa, South Korea, and the United Kingdom.

I find that plaintiff's request for a destruction of all ToolZall components is unwarranted given the jury's finding that the re-designed ToolZall does not infringe the LPST trade dress and given evidence that the same tool components used in the original ToolZall will also be used for the re-designed ToolZall.

Plaintiff's request for an increased damage award on its common law claims is also denied. Plaintiff bases this request upon an alternative jury instruction (#71.2) which would have advised the jury that it could, in the alternative, consider Cooper's advertising expenditures to determine a damage award for the common law claims. Defendant objected to this instruction and I declined to give this alternative damage instruction because neither of the two cases plaintiff cited, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997) and *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986), supported such an instruction.[2] Plaintiff has preserved this issue for appeal, and I reject any request for reconsideration.

As for defendant's claims that the punitive damage award is grossly excessive under *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), I find that the award is fairly proportional given both the nature of the conduct, evidence of intentional use of the modified LPST and the size of an award necessary to deter future similar conduct given defendant's size and assets. I also find that the jury was properly focussed upon defendant's actions, not its "speech" in reaching the award such that the constitutional concerns set forth in *Smallwood v. Fisk*, 146 Or. App. 695 (1997) are not implicated.

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[2] *Southland Sod* held that an award could encompass defendant's profits from the false advertising and plaintiff's costs of correction. *U-Haul* simply held that the fact that a defendant spent large sums on advertising could justify a presumption of public deception.

Based upon the foregoing and the jury's verdict, IT IS HEREBY ORDERED AND ADJUDGED:

1. That Leatherman Tool Group, Inc. ("Leatherman") has trademark rights in the overall appearance of the LPST;

2. That Cooper Industries, Inc.'s (Cooper) original ToolZall tool infringes Leatherman's trademark rights;

3. That Leatherman shall be awarded no damages for Cooper's infringement;

4. That Cooper, its officers, agents, servants, employees and attorneys and those in active concert or participation with Cooper who receive actual notice of this injunction, are hereby permanently enjoined from selling or offering to sell the original ToolZall within the United States and within the following foreign countries: Australia, Austria, Canada, Denmark Finland, France, Germany, Hong Kong, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Saudi Arabia, Singapore, Spain, Sweden, Switzerland, South Africa, South Korea, and the United Kingdom;

5. That Cooper's new ToolZall does not infringe Leatherman's trademark rights;

6. That Cooper has passed off and falsely advertised the original ToolZall tool in violation of both the Lanham Act and the common law of the State of Oregon,

7. That Cooper shall pay to Leatherman $50,000 as damages for its acts of passing off and false advertising;

8. That Cooper's actions of false advertising and passing off were carried out with malice or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and a conscious indifference to Leatherman's rights;

9. That Cooper shall pay $4.5 million in punitive damages; 40% to Leatherman and 60% to the Criminal Injuries Compensation Account of the Stat of Oregon;

10. That Cooper, its officers, agents, servants, employees and attorneys and those in active concert or participation with Cooper who receive actual notice of this injunction are hereby permanently enjoined from using the photographs of a multipurpose tool which appear on Cooper's original packaging for the original ToolZall toll and Cooper's initial advertising for the original ToolZall tool, or any photograph of a Leatherman Tool or components thereof, unless the photographs are clearly and prominently marked to identify Leatherman Tool Group, Inc. As the source of the pictured products;

11. That Cooper infringed Leatherman's copyright in a line drawing;

12. That Leatherman shall recover no damage for Cooper's copyright infringement;

13. That Cooper, its officers, agents, servants, employees and attorneys and those in active concert or participation with Cooper who receive actual notice of this injunction, are hereby enjoined from any further use of Leatherman's line drawing; and

14. That all remaining claims and counterclaims (save attorneys fees and costs to be addressed post-judgment) are dismissed with prejudice.

DATED this 14 day of November, 1997.

/s/

Malcolm F. Marsh
Federal District Court Judge

LEATHERMAN TOOL GROUP, INC., Plaintiff

v.

COOPER INDUSTRIES, INC., Defendant

CV No. 96-1346-MA

United States District Court for the District of Oregon

January 7, 1998

ORDER

MARSH, Judge.

On October 17, 1997, a jury returned a verdict finding that plaintiff had established trade dress rights in the overall appearance of its Pocket Survival Tool and that defendant willfully infringed those rights with its original Toolzall tool. The jury rejected plaintiff's claim that the defendant's "new" Toolzall with plastic covered handles violated plaintiff's trade dress rights. In addition, the jury found in plaintiff's favor on its claims of passing off, false advertising and unfair competition based upon evidence that defendant used one of plaintiff's tools in its early Toolzall promotional advertising. The jury awarded no damages on plaintiff's trade dress claim, awarded $50,000 actual and $4.5 million in punitives for plaintiff's common law claims. Defendant now moves for judgment as a matter of law (JMOL), a new trial and, alteratively, for a reduction in the punitive damage award under O.R.S. 18.537(3).

Defendant's motion for JMOL re-raises arguments I have previously rejected with entry of the preliminary injunction, denial of defendant's motion for summary judgment on functionality, numerous oral pretrial and trial rul-

ings, and resolution of issues within the judgment. Defendant has well-preserved these issues for appeal, but absent new authority or facts, I stand by my prior rulings.

Defendant's motion for a new trial is based upon several factors. First, defendant claims that plaintiff's counsel's admitted trial errors, when accumulated, were so prejudicial as to render the trial unfair. I carefully considered these issues at trial and found that the jury conscientiously considered and followed my curative instructions negating any prejudicial impact. Second, defendant claims that I made two last minute changes to the jury instructions which effectively "sandbagged" its trial strategy. The first relates to my changing the phrase "entire design" and "overall configuration" which appeared throughout the jury instructions to "entire overall appearance." The parties' submitted agreed and disputed jury instructions used each of these terms, often interchangeably. (See Proposed Agreed Instructions #14, 16, 17, 18 and 29). In fact, defendant submitted instructions to which the plaintiff objected which used the term "overall appearance" rather than "entire design." (See Proposed Defense Instructions #24.4 and 25-1). My intent was simply to make the instructions be consistent with one another. My selection of the phrase "overall appearance" was simply made to be consistent with the bulk of the trial testimony. I disagree that this change in any way prejudiced the defendant.

Defendant also claims prejudice from my addition to the functionality instruction of the phrase "need to compete" relative to the cost or quality of a product. While the final instruction did differ in this one respect from the preliminary instruction, defendant overstates the significance of the preliminary instruction. First, the preliminary instruction on functionality was given to point out the distinction between the common use of the word function or functionality and the

legal definition of the terms. As the words were used by both parties, it was important to make such a distinction. Furthermore, as part of the preliminary instructions, I specifically referred to the fact that the final instructions would govern deliberations. The final instructions were both read to the jury and two written sets are sent to the jury room for their consideration. Finally, I made the change at the plaintiff's request based upon the Second Circuit's holding in *Stormy Clime Ltd. v. Pro Group, Inc.*, 809 F.2d 971, 975 (1987), which I still consider to be a correct statement of the law. *See also, Villeroy & Boch Keramische Werke K.G. v. THC Systems, Inc.*, 999 F.2d 619, 620 (2d Cir. 1993).

Defendant's final basis for a new trial is its claim that the jury verdict was against the great weight of the evidence. Defendant specifically argues that the testimony of Timothy Leatherman and Roger Bjorklund was incredible and should not be considered. I find that there was ample evidence to support the jury's verdict and further find that the jury's careful distinction between the original and new Toolzall is evidence that they properly followed my instructions and correctly applied them to the facts.

Finally, defendant seeks a reduction in the punitive damage award under O.R.S. 18.537(3) which provides in pertinent part as follows:

> "In addition to any reduction that may be made under subsection (2) of this judgment requiring the payment of punitive damages entered against the defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages."

Defendant has come forward with evidence that it has sent memos to each operating division, brand managers, its ad agency, and plant managers directing that they not use others' products as the basis for advertising their own products. Defendant has also come forward with affidavits that all remaining literature which used the Leatherman LPST mock-up are or have been collected and destroyed. Defendant also intends to have brand managers meet with in-house counsel to ensure compliance with the policies set forth in the circulated memoranda.

Plaintiff objects on grounds that post-judgment efforts not considered by the jury should not be a proper basis for reduction of a punitive award under the Oregon statute. Plaintiff also claims that the purpose of punitive damages in Oregon is to punish as well as deter future wrongful conduct of the defendant and others. Defendant denies that punitive damages are meant to punish, arguing that deterrence is the sole justification.

I note that defendant's position relative to the purposes for punitive damages in Oregon is at odds with the agreed proposed joint jury instruction #73: "The purpose of punitive damages is to punish the wrongdoer . . . " It is also at odds with the Oregon statute, O.R.S. 18.537(1) which indicates that an award is appropriate for malicious or reckless conduct.

While the statute fails to specify whether remedial action must take place prior to or following a jury award, I agree with the plaintiff that in this particular case, defendant's post-judgment remedial efforts come too late to justify a reduction. Despite the entry of an agreed preliminary injunction relative to defendant's advertising materials depicting the LPST mock-up, defendant failed to take steps to actually retrieve the materials from vendors and advertisers even

though it admitted that its conduct was wrong. Thus, arguably inadvertent violations of the injunction did in fact take place. It wasn't until the entry of the judgment that defendant was prompted to take the significant steps that it now has implemented to ensure that its actions are not repeated. To allow a reduction in this instance would defeat the purpose of deterrence and would unjustifiably award a defendant who the jury found deserved to be punished for its conduct. Thus, defendant's motion for a reduction in the punitive award is denied.

Based on the foregoing, defendant's motion for JMOL (#346), motion for new trial (#344) and motion to reduce the punitive damage award (#338) are DENIED.

IT IS SO ORDERED.

DATED this 7 day of January, 1998.

/s/

Malcolm F. Marsh
Federal District Court Judge

LEATHERMAN TOOL GROUP, INC., Plaintiff

v.

COOPER INDUSTRIES, INC., Defendant

CV No. 96-1346-MA

United States District Court for the District of Oregon

December 18, 1996

OPINION AND ORDER

MARSH, Judge.

Plaintiff filed this action alleging that defendant has infringed its trade dress and engaged in unfair competition by manufacturing and marketing a tool substantially similar to the Leatherman Pocket Survival Tool (LPST), known as the Crescent Brand Toolzall (CBT). Plaintiff also contends that defendant used a touched up photograph of an LPST for one of its original product promotional brochures. Plaintiff asserts four claims for relief: (1) trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (2) unfair competition by use of the LPST in a Cooper ad also in violation of Section 43(a) of the Lanham Act; (3) False Advertising in violation of Section 43(a); and (4) common law unfair competition by advertising and selling an "imitation" tool substantially identical in appearance to the LPST.

Plaintiff seeks a preliminary injunction against the manufacture and sale of the CBT and any further use of the LPST in Cooper advertising. Defendant has conceded the latter motion relative to use of the LPST in any ads. An evidentiary hearing was held on December 12, 1996.

Defendant contends that plaintiff's LPST was unpatentable as "obvious" in 1980 and that its inherent functionality precludes trade dress protection under the Lanham Act. Defendant has filed a motion for summary judgment which has been stayed pending the preliminary injunction hearing. Plaintiff argues that while individual components of the LPST are "functional," the overall product configuration is arbitrary, non-functional and so unique such that the LPST is inherently distinctive and/or has acquired a secondary meaning.

The parties agree on the basic, relevant legal standards. The most difficult question presented is one of the application of these legal standards to the facts in this case in assessing whether the overall product configuration of the LPST is "functional" as that term is understood under the Lanham Act. The critical difference between the parties' theories relates to the functionality issue: defendant contends that any alternative designs must perform the exact same functions in precisely the same manner to constitute a viable alternative. If accepted, defendant's theory would conclude that the Leatherman design is the only design which performs all of these functions in precisely the same manner and thus, it is functional and unprotectable as trade dress. Plaintiff contends that functional alternatives include any multi-function tool that competes with Leatherman for sales.

As Professor McCarthy has appropriately noted in his treatise *McCarthy on Trademarks and Unfair Competition*, (3rd ed. 1996), "Each case of alleged functionality will present a unique set of facts not easily disposed of either by sweeping generalities or precise legal rules." 7-133.

The standard governing this motion is the usual sliding scale examination of the plaintiff's chances of success on

the merits weighed against the threat of irreparable harm. Plaintiff correctly notes that if it has a protectable trade dress and establishes a likelihood of confusion, irreparable harm is presumed. *Jensen v. Metrosound*, 4 F.3d 819, 827 (9th Cir. 1993).

Discussion

The Lanham Act makes "actionable the deceptive and misleading use of marks to protect persons engaged in commerce against unfair competition." 15 U.S.C. § 1127. Section 43(a) protects qualifying unregistered marks. Product configurations may come under the Lanham Act's protection as a "trade dress." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). "Trade dress" is defined as "the total image of a product including such features as size, shape, color or color combinations, texture, graphics or even particular sales techniques." *Kohler Co. v. Moen, Inc.*, 12 F.3d 632, 641 n. 11 (7th Cir. 1993).

Leatherman's claim for protection of its product configuration as a trademark or trade dress raises several issues. The configuration of the LPST is entitled to trade dress protection if plaintiff establishes that: (1) its trade dress is not de jure functional; (2) it is inherently distinctive or has secondary meaning; and (3) consumers are likely to be confused. *Two Pesos*, 505 U.S. at 760-70. The functionality issue is the most difficult and problematic in this case. Although somewhat disputable, plaintiff has come forward with evidence that its overall configuration is distinctive to consumers and retailers (i.e. they see the shape and think "Leatherman" or refer to knock-offs as a "Leatherman-style" tool) and that customers have been and are likely to be confused, particularly by mail order sales since Cooper's distinctive packaging will not be apparent.[1]

Defendant's unclean hands argument -- that plaintiff should not be entitled to protection because a couple of the components are not manufactured in the US despite the LPST's "made in the USA" label -- is without merit.

Plaintiff contends that its trade dress consists of the overall product configuration which includes: (1) the tool size; (2) shape of the handles; (3) shape of the gripping jaws; (4) selection, shape and placement of the gripping jaw features; (5) mirror image tool handles; (6) brushed stainless steel finish on the handles; (7) the selection, arrangement and shape of the various tool blades both individually and collectively; (8) the combination and arrangement of features; (9) the proportional sizes of the components; (10) the type and appearance of the pivot joint including the placement and arrangement of an identifying mark and "USA."

(1) Functionality

Functionality is a question of fact. *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 614 (9th Cir. 1989). A product feature is functional is "it is essential to the product's use or if it affects the cost or quality of the article." *Id.* Both

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[1] Defendant's argument against confusion is premised primarily upon its distinctive packaging. However, the Lanham Act protects post-sale as well as point of sale confusion. *Intsy-bit, Inc. v. Poly-Tech Industries*, 95 F.3d 663, 671 (8th Cir. 1996). Thus, plaintiff's evidence that customers return broken or defective knock-offs is proof of both association and post-sale confusion. Further, courts have held that "very little proof of actual confusion is required to prove a likelihood of confusion." Forum Corp. Of North America v. Forum, Ltd, 903 F.2d 434, 443 (7th Cir. 1990) (cites omitted).

patties agree that there are four factors relevant to functionality: (a) an expired utility patent disclosing utilitarian advantages of the design sought to be protected by the trade dress; (b) the extent of advertising which touts the utilitarian advantages of the design (e.g. the "Reach" toothbrush); (c) the availability of a "reasonable" number of design alternatives; and (d) whether the particular design results form a comparatively simple or cheap method of manufacture. *Clamp Mfg. Co. v. Enco Mfg. Co.*, 870 F.2d 512, 515 (9th Cir.), *cert. denied*, 493 U.S. 872 (1989).

The fact that a product is actually functional does nct preclude a finding of non-functionality of the trade dress for purposes of the Lanham Act. *See* McCarthy on Trademarks, 7-133 (uniquely shaped spray bottle constitutes protectable trade dress). In *Clamp Mfg*, the Ninth Circuit upheld a trial court's finding that a cantilevered "C" clamp design was non-functional. 870 F.2d at 516. The court noted that the case was "close," but held that while the clamp's design was clearly not arbitrary, sufficient evidence of alternative designs and competition in the field supported the trial court's findings. *Id.*

Similarly, the Eighth Circuit reversed a trial court's award of summary judgment to a defendant in a trade dress case involving quick change drill chucks. *Intsy-Bit, Inc. v. Poly-Tech Industries, Inc.*, 95 F.3d 663 (8th Cir. 1996). Although the case primarily addressed the issue of consumer confusion, the court also held that genuine issues of material fact precluded summary judgment on the issues of functionality and inherent distinctiveness. *Id.* at 672. As in this case, Intsy-Bit also relied upon an overall product configuration theory, contending that its trade dress consisted of a combination of color, shape and dimensions of its quick change chuck, drill guide and countersink. *Id.* at 667, n.6.

(a) There is no expired utility patent. There is a 1980 patent application for a tool that is similar to, but not identical, to the current LPST. This application discloses utilitarian advantages to the unique combination of tools and convenience of the compact design.

(b) The extent of advertising touting the utilitarian advantages of the design. Again, plaintiff draws the same distinction between utilitarian functions and the utility of the overall product design and defendant disputes the distinction. During the hearing, plaintiff's marketing director, Roger Bjorkland testified that Leatherman's use of phrases such as the "best combination of performance and functions" and "highest quality" constituted the same type of puffery used by others in the industry.

(c) The availability of alternative designs. McCarthy indicates that this is the most important factor of the four.

Plaintiff contends that there is a difference between the utilitarian advantages of compactness and multi-functioning and the overall "look" of the product based upon its configuration. Plaintiffs relies upon expert knife designers who opine that the unique product features plaintiff relies upon for trade dress protection are arbitrary and non-functional. *See* Declaration of Peter Kershaw and Alfred Mar. At the hearing, Kershaw testified that certain alternative design features found in competitive multi-tools present advantages over the Leatherman design. For example, Kershaw notes the advantage of placing the tool components on the insides of the handles so that the handle grips could be smoother and more comfortable in the hand. Kershaw examined and compared several competing multi-purpose tools, including the Gerber, SOG and Buck Knife. Kershaw opined that there was no magic to the 12-tool feature and felt that a

manufacturer need not offer the exact same features to compete with the Leatherman PST. Kershaw's testimony supported plaintiff's contention that Leatherman's enforcement of its trade dress rights has not precluded the introduction of alternative products and/or product improvements, variations and alternatives for the consumer market.

Plaintiff also proffers an expert declaration from David Allen, formerly a member of the U.S. Patent Appeals Tribunal who opines that the overall product configuration constitutes a unique trade dress.

During the hearing, Ben Rivera, Leatherman's Product Design Engineer testified that all new Leatherman products are designed to maintain the "Leatherman look." Rivera further testified that he felt it would be "easy" to re-design a 12 component multi-tool using the same 12 components found in the Leatherman PST which would be just as useful, but which would not look like a Leatherman. Examining the CBT, Rivera explained that the plier abutment was precisely the same as that which appears on earlier versions of the LPST but which has since been eliminated because it was actually a hindrance. Rivera opined that such a design feature could only be the product of deliberate copying since the abutment served no useful purpose; however, he also confirmed that the abutment was not an important element in the product's overall configuration.

Defendant argues that there is no distinction -- it is the overall uniqueness of the product design which plaintiff unsuccessfully sought to patent which is functional and non-arbitrary. Defendant proffers the declaration of Keith Jayma, the product engineer for the CBT who opines that the overall product configuration of the LPST is the product of a deliberate selection to enhance functional utility. Jayma contends that all of the LPST's features affect both its cost and quality.

Plaintiff proffers several examples of other multi-function tools made by Vitrinox, Gerber, etc. which do not look exactly like the LPST. Defendant claims that these are not fair comparators because any difference in tool selection, size or shape means that the tool will not perform exactly the same function. For example, if the pliers are longer and less tapered, they will no longer fit into certain smaller positions.

Defendant has not cited, nor have I been able to find, any case in which a court has required EXACT interchange ability of features. Such a concept does not make sense, however, given the underlying rationale of the Lanham Act which is to promote competition while protecting innovation. *See* McCarthy on Trademarks, 7-139; *Stormy Clime, Ltd. v. Pro Group, Inc.*, 809 F.2d 971 (2d Cir. 1987) (ultimate focus is upon impact to competition).[2] Thus, the critical inquiry focuses not upon the exact identity of individual functions but whether the alternatives proffered are true alternatives -- i.e. if a consumer purchased the Kutmaster Multimaster would the consumer also purchase an LPST or vice-versa?

---

[2] Defendant's reliance upon language in *Dogloo, Inc. v. Doskoch, Mfg. Co., Inc.*, 893 F. Supp. 911 (C.D. Cal. 1993) is misplaced given critical factual distinctions. While Judge Collins refers to "alternative means of performing the same function equally well" he did so in the context of a single-function item -- a dog house. To be viable alternatives, plaintiff had to come forward with alternative dog house designs -- bird cage designs would not do. I do not read this opinion to stand for the proposition that an alternative must perform all of the same functions, especially in the context of a multi-purpose tool where the attractiveness of the particular features chosen will vary greatly by customer need.

Plaintiff has come forward with seventeen alternative multi-tool designs which include many of the same tool components and perform enough similar functions such that they should be considered true alternatives. Whether there are all viable, quality alternatives to satisfy this factor is a debatable question. It appears, however, that the competition in the multi-function tool market is vigorous and that requiring Cooper to make a few modifications to its Toolzall so it doesn't look quite so much like the Leatherman should pose no harm to the market and little burden on Cooper's manufacturing process.

(d) Whether the particular design results from a comparatively simple or cheap method of manufacture: plaintiff's expert contend that the LPST design is neither simple nor cheap and offers no cost-saving advantages over comparable products. Defendant's experts disagree and claim that alternatives either do not perform the same functions or do not perform them as well. Jayma, Cooper's product designer, explained that while the Scotch-brite finish might not be the most cost-effective finish available in the market, it is what Cooper's manufacturing process is geared for; alternatives would require that Cooper hire out increasing expense.

Again, I am unaware of any requirement that alternatives perform precisely the same functions. Given the nature of the product as issue, such a requirement makes little sense. Plaintiff has come forward with persuasive evidence that its particular design involves neither an inexpensive nor simple form of manufacture.

Having considered all of the facts and arguments presented with a particular emphasis upon the number of alternative designs, I find that plaintiff has demonstrated a likeli-

hood of success on the merits on the issue of functionality. Given that defendant's evidence and arguments against a finding of functionality presented in opposition to plaintiff's motion for a preliminary injunction are the same as those presented with its motion for summary judgment, the motion for summary judgment is denied.

(2) Inherently Distinctive or Secondary Meaning

Whether a particular trade dress has acquired a secondary meaning is also a question of fact. *Vision Sports*, 888 F.2d at 614. Trade dress acquires a secondary meaning "when the purchasing public associates the dress with a particular source." *Id.* at 614-15. Such secondary meaning may be established by proof that actual purchasers associate the trade dress with a particular source, that the plaintiff's use of the dress has been exclusive, the length of plaintiff's use and the degree and manner of plaintiff's advertising. *Id*; *Clamp Mfg.*, 870 F.2d at 517. Expert surveys are the "most persuasive" evidence of secondary meaning but are not a prerequisite. *Vision Sports*, 888 F.2d at 615. Proof of copying is also considered "strong evidence" of secondary meaning. *Id.*

Plaintiff has come forward with some evidence that the public associates the overall product configuration of the LPST with Leatherman. Advertisements for knock-offs refer to the tool as a "Leatherman-style." Surveys proffered during the hearing have not been considered probative given the absence of sufficient foundational support. Plaintiff has, however, come forward with its reply exhibits with significant evidence that defendant deliberately copied the Leatherman tool and used actual Leatherman tool parts in producing its own Toolzall prototype. Jayma testified that he sent photographs of the Leatherman tool to obtain price quotes from packaging vendors.

Defendant denies deliberate copying. Defendant's designer Jayma further testified that the tools include several differences including the lock-in mechanism for the components, the fastener style, the blade edge for the knife component, the finish on several components, and the sizes of the Philips head and file.

Plaintiff has marketed the LPST commercially since 1983 and has sold over 7 million tools. Plaintiff has asserted its exclusive right to the LPST product configuration in 19 filed actions and numerous out-of-court, pre-filing settlement agreements. Thus, although plaintiff's sue of its particular configuration has not been entirely exclusive, it has maintained a policy of pursuing actions against those manufacturers who produce the most similar form of tools. Plaintiff has come forward with evidence of extensive advertising and catalog promotions, all of which feature the LPST prominently. Plaintiff's corporate logo is the LPST in an extended, flat position.

Based on the foregoing, I find that plaintiff has demonstrated a high likelihood of success in establishing secondary meaning.

(3) Likelihood of Confusion

Factors relevant to this element include: (a) strength of the trade dress; (b) similarity between plaintiff's and defendant's trade dress; (c) evidence of actual confusion; (d) marketing channels used; (e) type of goods and likely degree of purchase care; and (f) defendant's intent in selecting its trade dress. *Vision Sports*, 888 F.2d at 616. "Very little proof of confusion is required to prove a likelihood of confusion." *Nelson/Weather-Rite, Inc. v. Leatherman Tool Group, Inc.*, 1995 U.S. Dist. LEXIS 16575, *38 (N.D. Ill. 1995).

Plaintiff has come forward with evidence that customers and those in the industry associate a folding pliers, multi-tool with the tools rotating outwards form mirror-image handles, with Leatherman. The overall product configuration of the LPST is *highly* similar to that of the Toolzall: they are the same size, color, shape, dimension and proportionality. Visible differences include: (1) the name stamped on the handle (of the current version); (2) bolts of the LPST are flat surfaced, the Cooper's are grooved; (3) the Leatherman has better heft and adjusts more smoothly; (4) carrying pouches are a slightly different shape; (5) lettering on the pouches is red, but different type style and the LPST includes a white logo; (6) packaging is a different size, shape and color. Despite these differences, one must still pick them up and closely examine the marking to tell them apart. As noted previously, confusion may be established by both point of sale and post-sale confusion so that the distinctiveness of the packaging is NOT determinative. *Intsy-Bit*, 95 F.3d at 671.

As for evidence of actual confusion relative to Cooper's tool, plaintiff relies upon an industry rep (David Bregger) who attended the Chicago trade show in August. Bregger thought Leatherman was producing the tool for Cooper under a private label agreement and indicated that this was the rumor circulating throughout the conference. Because Cooper's tool has just recently been introduced, plaintiff has no evidence of actual consumer confusion between the LPST and CBT.

Both parties use the same marketing channels, and both products are the same type of goods likely to compete head-to-head. The likely degree of purchaser care will vary since the tools are marketed to experts (including police officers) as well as novices and the spouses of novice builders,

campers, etc. With its reply exhibits, plaintiff has come forward with evidence that defendant's intent in selecting its trade dress was based upon a goal of deliberately cutting into plaintiff's market share. Exhibit 46 is a Cooper memo indicating Cooper estimated that it would "take @ 5% of the Leatherman market." The product development team even referred the Toolzall as the "Cooperman" tool.

Conclusion

Although this is by no means a clear question, I find that plaintiff has shown a likelihood of success on the merits of its trade dress infringement claim and that irreparable harm should be presumed in addition to finding a threat of actual irreparable harm. Accordingly, plaintiff's motion for a preliminary injunction (#13) is GRANTED; defendant's motion for summary judgment on the issue of functionality (#26) is DENIED. In the absence of an specific evidence of financial harm posed to defendant, plaintiff is directed to post a bond in the amount of $100,000.

Defendant has also filed a letter request to compel Timothy Leatherman to more fully define plaintiff's asserted trade dress. I DENY this request as plaintiff has adequately identified the elements of its overall product configuration for which it claims trade dress protection. Plaintiff's specificity is comparable to the trade dress identification specificity seen in other factually comparable cases such as *Clamp Mfg.* and *Itsty-Bit*.

Plaintiff has also filed a motion to dismiss defendant's first counterclaim which seeks a declaration that plaintiff's failed patent attempt now means that the tool design is in the public domain. Plaintiff argues that because it is not seeking patent protection in this case, dismissal is appropriate because there is no live controversy involving pat-

ent protection. Since defendant has stated a claim and may be able to establish that the design is now simply part of the public domain (like a hammer design) and thus, unprotectable plaintiff's motion to dismiss (#55) is DENIED.

IT IS SO ORDERED.

DATED this 18 day of December, 1996.

/s/

Malcolm F. Marsh
Federal District Court Judge

LEATHERMAN TOOL GROUP, INC., Plaintiff

v.

COOPER INDUSTRIES, INC., Defendant

CV No. 96-1346-MA

United States District Court for the District of Oregon

December 20, 1996

ORDER

MARSH, Judge.

Defendant's motion for clarification (#77, filed Dec. 19, 1996) of my opinion and order of December 18, 1996, is GRANTED in part and DENIED in part as follows:

(1) the preliminary injunction against Cooper Tools' manufacture of the Toolzall is STRICKEN; Cooper is not enjoined from manufacture of the Toolzall, only sales or offers for sale of the product;

(2) this injunction applies only to domestic sales or offers for sale of the Cooper Toolzall;

(3) Cooper's comment that my order "requires" that Cooper modify the Toolzall is in error. The context of the statement quoted by Cooper is from the section of the opinion addressing the availability of alternative designs. The reference was solely intended to indicate the lack of hardship posed should a final order result in a finding of infringement against Cooper. Accordingly, Cooper's request that I specifically identify which individual elements of

plaintiff's tool design are arbitrary and non-functional is denied.

IT IS SO ORDERED.

DATED this 19 day of December, 1996.

/s/

Malcolm F. Marsh
Federal District Court Judge

Supreme Court, U.S.
FILED
AUG 3 2000
CLERK

No. 99-2035

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Leatherman Tool Group, Inc. is the only Respondent in this proceeding. Respondent certifies pursuant to Supreme Court Rule 29.6 that it has no parent corporation nor are there any publicly held companies owning 10% or more of its stock.

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Respondent Leatherman Tool Group, Inc. ("Leatherman") respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Cooper Industries, Inc. ("Cooper").

STATEMENT OF THE CASE

Leatherman disagrees with the Statement of the Case presented by Cooper.

In the fall of 1995 Cooper decided to manufacture and sell a multipurpose tool in competition with Leatherman's well known Pocket Survival Tool ("Leatherman Tool"). Cooper intended to take 5% of Leatherman's market: "Our take at 5% of the Leatherman market should [be] in the 3M range." ER 925; Exs. 67, 72.[1] Rather than design a tool of its own, Cooper decided to copy the successful Leatherman Tool. Cooper employees were instructed to purchase a Leatherman Tool because Cooper's would be "the same size, etc." Ex. 96.

Cooper planned to launch its "ToolZall" at the National Hardware Show ("Hardware Show") in Chicago in August 1996. ER 968. The Hardware Show is the most important trade show of the year and is attended by 70,000-90,000 people. Tr. 333, 497, 886. Cooper's plan was to introduce the ToolZall with considerable fanfare as one of its major new products for the year, using large posters, color brochures, flyers, and media kits. ER 624-26. Cooper also scheduled over two dozen advertisements in national print publications from June through November 1996. ER 753; Ex. 66.

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1. "ER" refers to the Excerpt of Record in the Ninth Circuit; "Tr." refers to the trial transcript; and "Ex." refers to trial exhibits.

Cooper began developing marketing materials in the spring of 1996. With no actual ToolZalls available to create the marketing materials, Cooper constructed a "mock-up" tool by grinding the Leatherman trademark from the handles and pliers head of a Leatherman Tool and replacing the fasteners. ER 702-06. While Cooper contends that Peter Jones, the Cooper Brand Manager overseeing the project, was unaware that the mock-up was a modified Leatherman Tool, Cooper is wrong. In his deposition, Mr. Jones reluctantly acknowledged that he knew that the mock-up ". . . may include some components from other multifunction tools," including Leatherman's. ER 656-58. Mr. Jones forwarded the mock-up to Bill Bliss, Cooper's liaison to the advertising agency, to give to the advertising agency. ER 708. The agency returned the mock-up to Mr. Jones. Ex. 100. Although the Leatherman trademark had been ground off the tool, a curved indentation remained on the pliers head where the trademark had appeared. ER 757. To remove this curved mark from a photograph of the mock-up tool, Cooper's advertising agency retouched the photograph at the direction of Mr. Jones. ER 714-15; Exs. 21-26.

Cooper used the photograph of the barely modified Leatherman Tool (the "Leatherman photograph") in all of its packaging and initial marketing materials, including brochures, catalog pages, press kits, posters and print advertisements. ER 753-56. These marketing materials were prominently displayed and widely distributed at the Hardware Show. ER 622-26. The marketing materials were given to Cooper salesmen for distribution to thousands of Cooper's customers[2] and made available to a lengthy list of Cooper's customers. ER 623-26, 632.

2. Cooper does not sell directly to consumers. Cooper's customers are vendors who sell to the public.

Cooper's use of the Leatherman photograph caused confusion. At the Hardware Show both Cooper and Leatherman were asked whether Leatherman manufactured the ToolZall for Cooper. ER 719; Tr. 98. Others were confused by Cooper's use of the Leatherman photograph, at and after the show. ER 731-41.

Cooper also used other depictions of the Leatherman Tool to portray its ToolZall. In order to show Cooper's international sales representatives a picture of the ToolZall, Mr. Jones copied a line art drawing of the Leatherman Tool. He then "whited out" the Leatherman trademark from the drawing, transferred the modified drawing to a computer disk and e-mailed it to foreign representatives as a drawing of the ToolZall. ER 640-41, 666.[3]

In September 1996, one month after the Hardware Show, Leatherman filed suit against Cooper alleging trade dress infringement, passing off, and false advertising. While Cooper promptly acknowledged that its marketing materials and packaging displayed a photograph of a modified Leatherman Tool, no immediate action was taken. Cooper waited a full two months until November 20, 1996 before recalling the misleading marketing materials from its sales personnel. ER 627-28; Ex. 217. However, Cooper made an affirmative decision not to recall the misleading materials from thousands of customers, numerous mail order catalogs and other recipients. *Id.* Cooper's memorandum to its sales personnel instructed them, in bold type, not to retrieve the marketing materials from Cooper's customers. ER 905-06; Ex. 217.

3. On October 6, 1997, Cooper stipulated to judgment on the copyright infringement claim arising from these acts.

On December 18, 1996 the district court entered an injunction prohibiting sale of the ToolZall and on December 20, 1996 Cooper stipulated to an injunction against use of the packaging and marketing materials displaying the Leatherman photograph. Cooper's decision not to recall the marketing materials resulted in thousands of violations when Cooper's customers, including mail order catalogs, used the Leatherman photograph to advertise the ToolZall. ER 627-36. Following entry of the preliminary injunction, the misleading Leatherman photograph appeared in at least four national publications. ER 1061-69.

At trial in October 1997, Tim Miller, Vice President for Sales and Marketing for Cooper's Hand Tools Division, testified that in March and April 1997 (several months after the preliminary injunction) Cooper's customers printed and distributed thousands of fliers showing the Leatherman photograph. ER 632-35. Mr. Miller also testified that there was no way of knowing how many advertisements using the misleading Leatherman photograph were still in circulation. ER 635, 636. Finally, Mr. Miller confirmed that Cooper made no initial efforts to gather these marketing materials, and did so only after many months because Leatherman insisted. ER 628-30.

Neglecting to recall the misleading marketing materials was not the only act of indifference by Cooper. In February 1997, two months after the preliminary injunction was entered, Cooper again used the Leatherman photograph, this time to create marketing materials and packaging for foreign markets. ER 636. When Leatherman promptly complained, Cooper waited until May 31, 1997 to recall the materials. ER 637-38. Mr. Miller admitted at trial that he did not know how many fliers or advertisements were distributed throughout the world showing the modified Leatherman Tool. ER 636.

After the jury awarded Leatherman $50,000 in compensatory damages[4] and $4.5 million in punitive damages, Cooper finally took remedial steps to insure that all remaining marketing materials using the Leatherman photograph were either being collected or had been destroyed. Cooper's Petition at 29a-30a. Based on these post-verdict efforts, Cooper sought to have the punitive damages award reduced. The district court declined to reduce the award, finding instead that:

> Despite the entry of an agreed preliminary injunction relative to defendant's advertising materials depicting the [Leatherman Tool] mock-up, defendant failed to take steps to actually retrieve the materials from vendors and advertisers even though it admitted that its conduct was wrong. Thus, arguably inadvertent violations of the injunction did in fact take place. It wasn't until the entry of the judgment that defendant was prompted to take the significant steps that it now has implemented to ensure that its actions are not repeated. To allow a reduction in this instance would defeat the purpose of deterrence and would unjustifiably award a defendant who the jury found deserved to be punished for its conduct.

January 7, 1998 District Court Order (Cooper's Petition at 30a-31a).

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4. The compensatory damages were low because Leatherman brought suit immediately and a preliminary injunction was entered four months after the introduction of the ToolZall.

REASONS FOR DENYING THE WRIT

Neither question presented by Cooper merits the Court's review. Cooper never raised the standard of review question before the Ninth Circuit. The district court and the appellate court faithfully applied the standards approved by the Court. The trial court tested the constitutionality of the punitive damages award against the criteria established in *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996) ("*Gore*"), and its findings are supported by the record as presented in Leatherman's Statement of the Case. The Ninth Circuit, in accordance with the decisions of this Court, reviewed the evidence and determined that the district court did not abuse its discretion.

I.

THERE IS NO NEED FOR THE COURT TO CONSIDER THE STANDARD OF REVIEW

Cooper failed to preserve its argument that de novo is the correct standard of review. The question is newly minted for the purpose of obtaining a writ of certiorari. While the circuits have applied both de novo and abuse of discretion standards, none has considered and rejected the view of another circuit. Further, the lack of a record below makes this an inappropriate case in which to consider the question. Finally, the Ninth Circuit followed the teachings of this Court by reviewing the trial court's decision for abuse of discretion.

A. Cooper Failed to Raise the Standard of Review Before the Ninth Circuit

In a question raised for the first time in its Petition for Certiorari, Cooper argues that a trial court's determination of whether a punitive damages award violates the Due Process Clause should be reviewed de novo rather than for abuse of discretion. Since this issue was not raised below, the Ninth Circuit did not consider the question and the Court should deny Cooper's petition. *See, e.g., Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (" 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them,' " (*quoting Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970))); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (where argument was inadequately preserved in prior proceedings, Supreme Court will not consider it).

Cooper never specifically identified for the Ninth Circuit the appropriate appellate standard of review for due process considerations. Cooper's appeal to the Ninth Circuit raised three issues with respect to the award of punitive damages: (1) violation of the Oregon Constitution; (2) violation of Oregon's punitive damages statute; and (3) violation of the Due Process Clause of the United States Constitution. In its opening brief to the Ninth Circuit Cooper did not separately identify the correct standard of review for each of these punitive damages issues, but lumped the three issues together under the heading "the erroneous award of punitive damages," which in turn was listed as one of four errors of the district court that should be reviewed de novo. The only reference in Cooper's brief to a standard of review of punitive damages appeared as follows:

> The asserted errors of the District Court are reviewed under the following standards:
>
> De Novo: the erroneous grant of summary judgment . . . ; the erroneous denial of JMOL . . . ; the erroneous legal analysis underlying the attorneys' fees award . . . ; and the erroneous award of punitive damages. *Central Office Tel., Inc. v. AT&T*, 108 F.3d 981, 993 (9th Cir. 1997); *see Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1251-52 (9th Cir. 1997).[5] Cooper's Ninth Circuit Opening Brief at 2-3.

In contrast, Leatherman's brief to the Ninth Circuit separately identified the correct standard of review for each of the three punitive damages issues and stated that a district court's determination that a punitive damages award does not violate due process is reviewed for abuse of discretion. Leatherman's Brief at 5. In its discussion on the merits, Leatherman again asserted the abuse of discretion standard. Leatherman's Brief at 57. Despite Leatherman's repeated advocation of the discretionary standard, Cooper's Ninth Circuit Reply Brief and its Petition for Rehearing ignored the issue.

Thus, the Ninth Circuit was not put on notice of Cooper's now critical contention that de novo is the correct standard

5. Neither of the cases cited by Cooper in support of a de novo standard of review of an erroneous award of punitive damages directly addresses whether the appellate court reviews a due process challenge to a punitive damages award under the de novo or abuse of discretion standard. In *Central Office*, the issue was whether a punitive damages jury instruction should have been given. 108 F.3d at 993. *Eastwood*, 123 F.3d 1249, does not address punitive damages.

of review. The issue was not litigated below and no record regarding the correct standard of review was developed. As this Court has stated: "Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (citation omitted). The Petition should be denied because the standard of review was not litigated below.

B. The Standard Has Not Been Sufficiently Considered by the Circuit Courts

It is premature for the Court to consider the appropriate standard of review. While neither standard is uniformly used, none of the circuit court opinions cited by Cooper considered and rejected a standard of review adopted by another circuit.[6] In 1999, the Eleventh Circuit panel in *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 329 (1999), stated that

6. The Ninth Circuit case cited by Cooper, *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909 (9th Cir. 1999), simply repeated the abuse of discretion standard, citing *Browning-Ferris Ind. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The Second Circuit employed the same standard in *Lee v. Edwards*, 101 F.3d 805, 808 (2nd Cir. 1996) (*citing Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435-36 (1996)). The Seventh Circuit, in *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 736 (7th Cir. 1998), concluded that the district court did not abuse its discretion. Likewise, two of the cases cited by Cooper as affording de novo review are based upon perfunctory statements. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1229 (10th Cir. 2000); and *United States v. Big D Enter., Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999), *cert denied*, __ U.S. __, 120 S. Ct. 1419 (2000).

the appropriate standard of review was being considered as a matter of first impression. In this case the Ninth Circuit did not discuss the appropriate standard of review, but merely concluded in its memorandum opinion that the district court had not abused its discretion in upholding the punitive damages award. December 17, 1999 Memorandum (Cooper's Petition at 4a). If the Court determines that consideration of the appellate standard of review is important, it should wait for a case with a better developed record. *See Browning-Ferris*, 492 U.S. at 277.

C. The Court's Prior Decisions Support the Abuse of Discretion Standard

In *Browning-Ferris*, the Court stated that appellate courts should use an abuse of discretion standard to review a district court's decision regarding a punitive damages award. 492 U.S. at 278-79. The Court went on to state: "[W]e perceive no federal common-law standard, or compelling federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial." *Id.* at 279-80. While *Browning-Ferris* did not address due process concerns regarding punitive damages awards, later decisions of the Court confirm that decisions of the district courts should be accorded substantial deference. *Gasperini*, 518 U.S. at 434-35; *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991); and *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456-57 (1993).

In *Haslip*, the Court considered whether a punitive damages award violated the Due Process Clause. 499 U.S. at 18. The Court explained: "As long as the discretion [of the jury] is exercised within reasonable constraints, due

process is satisfied." 499 U.S. at 20. The Court then explained that the appellate court provides "an additional check on the jury's or trial court's discretion," 499 U.S. at 20-21. *See also* 499 U.S. at 24 (Scalia, J., concurring) ("the jury's discretion . . . was not undue").

In *TXO*, 509 U.S. at 456-57, the Court did not require heightened scrutiny, explaining that the jurors were impartial, that their damage award was based upon collective deliberation of the evidence and was reviewed by the trial court and an appellate court, and that such judgment was entitled to a strong presumption of validity.[7]

An abuse of discretion standard is consistent with these earlier decisions since it matches the standard for the reasonableness of a punitive damages award.[8] Violation of a state law "reasonableness" requirement does not necessarily establish that an award is so "grossly excessive" as to violate the Due Process Clause. *TXO*, 509 U.S. at 458 n.24. Only when an award can fairly be categorized as " 'grossly excessive' . . . does it enter the zone of arbitrariness that violates the Due Process Clause." *Gore*, 517 U.S. at 568. Since an award that is grossly excessive is necessarily unreasonable or excessive, it places an illogical burden upon an appellate court to require that a punitive damages award be reviewed for gross excessiveness de novo, but for excessiveness using abuse of discretion.

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7. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 and n.10 (1994), decided the year after *TXO*, confirmed the need for judicial review of punitive damage awards, but did not suggest that such judicial review include de novo appellate review.

8. An abuse of discretion standard is also consistent with the Seventh Amendment. *Gasperini*, 518 U.S. at 435; *Browning-Ferris*, 492 U.S. at 280 n.26.

II.

THE PUNITIVE DAMAGES AWARDED WERE NOT GROSSLY EXCESSIVE

This case presents no important legal issue meriting the Court's attention. Both parties agree that *Gore*, 517 U.S. 559, governs the due process analysis, their Ninth Circuit briefs applied the *Gore* guideposts to their respective view of the facts and the district court confirmed that it applied the *Gore* guideposts. The Court should not grant Cooper's writ to apply *Gore* to the particular facts of this case.

Cooper used a touched-up photograph of Leatherman's established product to jump-start its inferior[9] competing product. Despite entry of a preliminary injunction, Cooper chose not to retrieve marketing materials using the misleading Leatherman photograph. The ratio of 90 to 1 is artificially high because Leatherman brought suit immediately and obtained a preliminary injunction. The reprehensibility of Cooper's conduct and the potential harm to Leatherman justify a large award.

A. Cooper's Conduct Was Reprehensible Under Gore

Mr. Jones knew that the mock-up was a barely modified Leatherman Tool but used a photograph of the mock-up on all ToolZall packaging and marketing materials. ER 656-58. The numerous post injunction uses of the Leatherman photograph resulted foreseeably from Cooper's deliberate decision not to retrieve the marketing materials. Cooper

9. At trial there was unrebutted testimony that the Cooper ToolZall was inferior in quality to the Leatherman Tool. ER 594.

created new marketing materials for foreign markets with the Leatherman photograph after entry of the preliminary injunction. ER 636. Omitted from Cooper's Statement of the Case is the fact of Cooper's infringement of Leatherman's copyright rights when Mr. Jones copied the drawing of the Leatherman Tool and whited out the Leatherman trademark. ER 640-41, 665-66. Cooper's characterization of the district court's description of the injunction violations as "inadvertent" is misleading.[10]

B. The Gore Guideposts Support the Award

As described above, Cooper's conduct was reprehensible and is easily distinguished from BMW's conduct in *Gore*. BMW's transgression — undisclosed presale repainting of an automobile — is quite different in character from the conduct of Cooper. Cooper passed off a photograph of Leatherman's product as its own, copied a drawing of Leatherman's product and represented it as its own, permitted others to continue to publish the misleading Leatherman photograph despite a preliminary injunction, and created new marketing materials after the injunction was entered, all in order to sell an inferior tool. These actions amount to "trickery and deceit" and are "more reprehensible than negligence." *Gore*, 517 U.S. at 576 (*citing TXO*, 509 U.S. at 462). While BMW may have been justified in claiming that it did not know it had done anything illegal, Cooper cannot take such refuge. It knew very well that what it did was wrong. Cooper stipulated to an injunction and did not appeal

10. The district court actually said "arguably inadvertent," in the midst of a paragraph describing the conduct of Cooper which led to the injunction violations. January 7, 1998 District Court Order (Cooper's Petition at 29a-30a).

the jury's finding of passing off or willfulness. The Copyright Act, the Lanham Act, and state laws against passing off and false advertising were sufficient notice to Cooper that using another's product as its own for advertising purposes was illegal. Passing off and false advertising are recognized torts at common law and Cooper must have been aware that punitive damages for these offenses are often awarded to punish and deter. Thus, Cooper had fair notice not only that its conduct could subject it to punishment, but also that severe punishment in the form of punitive damages was possible. *Gore*, 517 U.S. at 574.

The excessiveness of the punitive damages award is measured against the state's legitimate interest in punishment and deterrence. *Gore*, 517 U.S. at 568. The state has a strong interest in protecting its citizens against false advertising and passing off. Under Oregon's Unlawful Trade Practices Act ("UTPA"), anyone found to have willfully[11] used an unlawful trade practice in a suit instituted by the state may be penalized up to $25,000 per violation. Or. Rev. Stat. § 646.642(3) (1999). Although this provision is limited to suits instituted by the state, it demonstrates that serious financial penalties are possible for such conduct. Under Or. Rev. Stat. § 646.642(1) (1999), anyone who willfully violates an injunction entered pursuant to the UTPA shall be penalized $25,000 per violation.[12] These statutes also put Cooper on notice that severe penalties were possible.

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11. The jury made a specific finding that Cooper's conduct was willful. ER 749-52.

12. Thousands of copies of the advertising materials showing the Leatherman Tool were distributed by Cooper and its vendors. ER 622-38, 640-41, 1061-69.

Cooper emphasizes the 90 to 1 ratio as if it alone makes the award grossly excessive. However, this Court has upheld punitive damage awards well in excess of 90 to 1. In *TXO*, 509 U.S. at 459, 462, the Court upheld a ratio of 526 to 1 on the basis of reprehensible conduct and potential harm. The Court has repeatedly stated that there is no "mathematical bright line" which separates merely excessive awards from grossly excessive awards. *TXO*, 509 U.S. at 458; *Haslip*, 499 U.S. at 18. Due process does not require that a punitive damages award be "reasonable," only that it not be grossly excessive. *TXO*, 509, U.S. at 458 and n.24.

The 90 to 1 ratio is misleading. The actual damages were small in comparison to the punitive damages because Leatherman acted promptly in bringing suit and obtaining a preliminary injunction, forcing Cooper to suspend sales of the ToolZall shortly after its introduction. Although Cooper characterizes the second *Gore* guidepost as relating to actual harm (Cooper Petition at 18), *Gore* refers to "actual and potential damages." *Gore*, 517 U.S. at 581-82. The potential damage to Leatherman was substantial. Untold thousands of the Leatherman photograph were distributed by Cooper's customers, mail order catalogs and magazine advertisements. ER 622-36, 640-41, 753-56, 1061-69; Tr. 333, 497, 886; Ex. 66. Cooper's use of the Leatherman photograph confused people, causing them to think that Leatherman was making the ToolZall for Cooper. ER 719, 731-741; Tr. 98. Confused customers would have purchased the inferior ToolZall because they thought it was made by Leatherman. Cooper planned to take 5% of Leatherman's business, estimated by Cooper to be $3 million. ER 925; Exs. 67, 72. Except for Leatherman's prompt action, its actual damages would have been greater, making the ratio between compensatory and punitive damages smaller. The award of $4.5 million is reasonable in relation to the potential harm from Cooper's wrongful conduct.

The punitive damages award is also reasonable in relation to Cooper's size. Cooper's total assets for 1996 were $5.9 billion. Tr. 704-05. The punitive damages award is less than 0.1% of Cooper's total assets. A lesser amount would not serve the purpose of deterrence. *See TXO*, 509 U.S. at 463.

CONCLUSION

Cooper's Petition for Certiorari is not well founded. Cooper failed to raise the standard of review issue below and now asks this Court — almost as an afterthought — to consider the issue without the benefit of an appellate court ruling. The punitive damages award received the necessary appellate review under this Court's relevant precedents. Cooper's Petition also fails on the merits, since the punitive damages award is justified by Cooper's reprehensible conduct and the potential harm to Leatherman.

The Petition for a Writ of Certiorari should be denied.

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No. 99-2035

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Contrary to Respondent's contentions, this case provides the Court with the perfect opportunity to reconcile the deep divisions among appellate courts over the proper standard for reviewing due process challenges to the excessiveness of punitive damage awards. The issue was squarely presented to the Ninth Circuit and is now properly before this Court. Furthermore, an independent, *de novo* review of the undisputed facts here compels the conclusion that the punitive damages imposed by the jury and perfunctorily affirmed by the district court are so excessive as to violate the standards set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

I. Petitioner Adequately Raised Standard of Review Issue in the Ninth Circuit

It is difficult to understand how Respondent can argue in good faith that Petitioner is raising the standard of review issue for the first time in this Court. Petitioner explicitly addressed this matter in its Ninth Circuit opening brief. The relevant passage, in fact, is conveniently reproduced by Respondent in full in its opposition brief. (Opp. at 8).

Notwithstanding Petitioner's urging below that a *de novo* standard be applied to the punitive damages issue, Respondent advances here a waiver argument due to Petitioner's failure in the Ninth Circuit to (1) delineate a distinct review standard for its state law and federal constitutional attacks on the award, and (2) cite an on-point case in support of a *de novo* standard. Respondent's argument has no merit. There can be no mistake that Petitioner's Ninth Circuit brief sought *de novo* review on *both* the company's state law and federal constitutional challenges; repetitive rhetoric was unnecessary. *See Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1050 n.15 (9th Cir. 1999) (no obligation to give an issue

"extensive" treatment in order to avoid abandonment). Nor is there any requirement that an appellant buttress its legal argument with the most relevant published opinion in order to properly preserve the issue.

More to the point, Respondent well understood and fully appreciated that Petitioner was promulgating a *de novo* review standard on the appellate court, and it thus responded by arguing for abuse-of-discretion review. (Appellee's Br. at 5). The issue was, therefore, plainly raised and joined in the Ninth Circuit. Without articulating any reasoned explanation for its ruling, the court below adopted Respondent's position. (App. 4a). The court of appeals' decision to take up the matter is, standing alone, enough to permit review in the Supreme Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (embracing disjunctive rule under which writ of certiorari may be granted if the question presented was *either* pressed by a litigant *or* passed upon by the court below).

II. Resolution of Circuit Split on Appropriate Standard of Review is Ripe for Supreme Court Determination

As described at length in both the initial petition and the brief of *amici curiae*, appellate courts are clearly divided over the proper standard of review for evaluating alleged constitutional excessiveness in punitive damage awards. While acknowledging the circuit split, Respondent maintains that Supreme Court precedent clearly signals an abuse of discretion standard in this context. (Opp. at 10-11). This contention sorely misreads the decisions of this Court. None of the cases cited by Respondent examined the proper scope of appellate review in due process challenges to the excessiveness of punitive damage awards. The Court, in fact, made clear in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), that the issue remains open. The excerpted quotations in Respondent's brief all pertain to general limitations on punitive damages; they do not focus on, let alone decide,

the requisite degree of appellate review. The very division among the circuits on the issue underscores the fallacy of Respondent's argument.

Respondent also suggests that this Court's intervention would be premature because the issue purportedly has not been "sufficiently considered" by federal appellate courts. (Opp. at 9-10). The problem, according to Respondent, is that no circuit has explicitly rejected another circuit's review standard while reciting its own approach. This rather bizarre observation does not cast out the circuit split, but instead, reflects a basic lack of appreciation for the policy considerations underlying the Supreme Court's evaluation of petitions for certiorari.

The presence of a circuit conflict on an important legal question represents one of the primary circumstances in which this Court traditionally exercises its discretionary jurisdiction. *See* Sup. Ct. Rule 10(a). Resolution of the division helps minimize the balkanization of the federal judiciary by ensuring that the particular legal rights at stake are accorded uniform and proper appellate treatment. Similarly, the Court's plenary review facilitates the rigorous enforcement of statutory and constitutional rights.

The fact that the various courts of appeals may have reached their differing results under abbreviated analyses is no reason for the Supreme Court to allow the conflict to continue to fester. Indeed, particularly in this era of growing summary dispositions by federal circuit courts, "it is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the court below might have relied on" in reaching its decision. *Lawrence v. Chater*, 516 U.S. 163, 170 (1996) (per curiam) (emphasis and internal alteration omitted).

Furthermore, there are a number of explanations why an appellate court opinion might neither cite nor discuss con-

flicting rulings from other jurisdictions. A court, for example, may be unaware of the split. The burgeoning dockets in many circuits render it difficult for judges to keep track of the latest jurisprudence in their *own* court, let alone that of sister tribunals. Nowhere is this more evident than the Ninth Circuit, where intra-circuit conflicts are omnipresent. Even if a court is aware of the split, however, general notions of comity may counsel against the explicit repudiation of another circuit's reasoning. In addition, little is accomplished by referencing an appellate conflict on an issue which, like the one here, most courts have disposed of in summary fashion. Nevertheless, the often outcome-determinative division remains real and cries out for Supreme Court guidance.

III. This Case is Particularly Well Suited for Resolving the Circuit Split on Appropriate Standard of Review

The punitive damages imposed against Petitioner here would never have survived judicial scrutiny in any circuit applying a *de novo* standard of review. Only the most deferential review, unencumbered by a faithful adherence to the guideposts established by this Court, could sustain this exceedingly disproportionate award. The Ninth Circuit unquestionably employed just such a standard. The case at bar, therefore, presents the Court with the perfect opportunity to clarify the proper review standard on Due Process Clause challenges to the excessiveness of punitive damages.

A. Reprehensibility of Petitioner's Conduct

Nothing in Respondent's opposition brief undermines Petitioner's core claim that its actions bore none of the aggravating factors associated with particularly reprehensible conduct—the benchmark for a punitive damage award. *See Gore*, 517 U.S. at 575. Respondent does not dispute that its

damages were wholly economic and amounted only to the small number of sales it purportedly lost to consumers purchasing Petitioner's Toolzall. Respondent merely emphasizes that Petitioner's decision not to retrieve all marketing materials depicting the modified Leatherman Pocket Survival Tool ("PST") resulted in the improper use of those materials subsequent to the injunction.[1]

This assertion critically ignores the accepted fact that Petitioner had voluntarily withdrawn its Toolzall from the marketplace in October 1996—nearly two months before the injunction issued. (Tr. 733). Thus, the tool pictured in the challenged ads was at no time available for sale to consumers following entry of the injunction. Accordingly, there was no prospect that Respondent could have sustained any conceivable damages from the post-injunction display of those materials.

Nor can Respondent get any mileage out of its questionable passing reference to Petitioner's stipulation to judgment on Respondent's copyright infringement claim. (Opp. at 3, 13). This cause of action is manifestly of no relevancy here. The issue was never presented to the jury and, therefore, could not possibly have formed the basis of any component of the punitive damages award. In fact, the parties in their stipulation agreed that Respondent suffered no damages from the copyright infringement. (Dkt. # 289).

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[1] The initial petition stated that the district court described as "inadvertent" Petitioner's failure to ensure the withdrawal of all post-injunction modified PST advertisements. Respondent correctly clarifies that the district court's phrase was, more accurately, "*arguably* inadvertent." (Opp. at 13) (emphasis added). There was no attempt by counsel to mislead. Whether "inadvertent" or "arguably inadvertent," the essential point is that Petitioner's post-injunction conduct clearly cannot be characterized as so reprehensible as to justify a substantial punitive damages award.

B. Ratio of Punitive Damages to Compensatory Damages

Respondent's brief also provides no satisfactory answer for the unconstitutional excessiveness of the 90:1 ratio between the jury's compensatory and punitive damage award. The essential point it makes on this issue is that the ratio is inflated because Petitioner's false advertisements *potentially* could have caused a substantial amount of additional injuries. Specifically, Respondent suggests that, but for its prompt filing of the lawsuit and procurement of a preliminary injunction, confused consumers would have bought Petitioner's Toolzall in lieu of a PST, thereby eroding a significant percentage of its sales. (Opp. at 15).

Respondent's theory contradicts the Ninth Circuit's legal conclusions. Its factual predicate—*i.e.*, that Petitioner acted unlawfully by copying Respondent's PST and selling a similar product under its own name—while successfully advanced at trial, was squarely rejected by the court of appeals. (App. 7a-16a). The Ninth Circuit held that Respondent had no protected rights in its PST, and that any entity was free to copy it. Accordingly, Respondent would be entitled to no redress for any market share diminution (or conjectured diminution) attributable to consumer purchases of Petitioner's Toolzall.

Respondent's further claim that consumers would be confused by Petitioner's advertisements is similarly at odds with the undisputed facts and express Ninth Circuit findings. Petitioner never represented that its product had any relationship to the PST or to Respondent. Indeed, not only did the controverted ads clearly delineate the manufacturer of the tool, (ER 83-84), but the court of appeals noted definitively that customers purchasing Petitioner's Toolzall would have received exactly that for which they paid. (App. 3a). The court added that Petitioner's use of the modified PST did not "involve the same sort of potential harm to [Respondent] or

to customers as that which may arise from traditional passing off." (App. 3a-4a).

C. Comparable Civil Penalties

Finally, Respondent's references to Oregon's Unlawful Trade Practices Act are totally unavailing. Petitioner agrees that the statute's authorization of the State to seek $25,000 penalties for "willful" violations of an injunction issued under the Act underscores the State's interest in minimizing unlawful trade practices. But, as noted in the initial petition, the jury's finding of malice here was based solely on conduct *preceding* imposition of the injunction. There is thus no room for the fanciful suggestion that Petitioner can be deemed to have willfully violated an injunction (to which it had voluntarily stipulated) by disseminating false advertisements for a product that it had taken off the market months before the injunction issued.

D. Plenary Review is Warranted

In sum, Respondent's efforts to finesse the grossly excessive punitive award cannot be reconciled with the record and must be rejected. Respondent's opposition brief accomplishes nothing other than to distort the record and attempt to demonize Petitioner with irrelevant facts. These tactics accentuate the mischief in an overly deferential review of due process challenges to punitive damage awards.

An independent and dispassionate *de novo* appellate review would have exposed the glaring vulnerabilities in Respondent's arguments. The Ninth Circuit, however, eschewed such an analysis and opted to view the legal issue of gross excessiveness solely through the narrow prism of the district court's one-sentence factual findings. (App. 3a, 24a). *Amici* outlined the risks associated with this approach, (*Amici* at 2, 13-15), and those prophecies were fulfilled in the instant action. Indeed, the result was the sanctioning of an irrational

jury verdict under the guise of trial court discretion, and the discarding of essential due process safeguards against the imposition of punitive damages predicated on bias or passion.

Too often, the protections of the Due Process Clause against excessive punitive damages are eclipsed by overheated rhetoric and the caprice of individual juries and trial court judges. By granting review in this case and mandating a considered, *de novo* standard of appellate review, the Supreme Court can ensure that the guideposts established in *Gore* are faithfully enforced and thereby restore rationality to the award of punitive damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors with expertise in the fields of federal jurisdiction, constitutional law and legal history, both of whom appeared as *amici* in the last major case in which this Court grappled with the proper scope of federal appellate review of jury damage awards, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Our qualifications are summarized in the Appendix.[1]

We have no interest in the outcome of the particular lawsuit at bar. We file this brief solely to alert the Court to the need to grant certiorari in this case to resolve the first question presented in the petition, which addresses the fundamental conflict and confusion among the federal circuit courts of appeals regarding the proper scope of appellate review for jury-awarded punitive damages.

SUMMARY OF ARGUMENT

Petitioner asks this Court to grant review in this case, first and foremost, to resolve a conflict that exists among the federal circuit courts of appeals regarding the nature of federal appellate review of punitive damage awards issued by juries. *See* Petition for Certiorari ("Pet.") at 8-13. Although we differ somewhat with petitioner on how the circuit conflict is most appropriately described, the circuit conflict is real and substantial. The fundamental matter dividing the circuits is whether to apply in the punitive damages context the standard of appellate review that has traditionally been used in all other contexts — in both criminal litigation and civil litigation alike — when one party argues that the result reached by the jury is not sustainable on the particular record of the case.

Several circuits, when reviewing attacks on punitive damage awards for "gross excessiveness," engage in a *de novo* review of

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

whether the amount awarded by the jury is rational on the particular record. This review standard gives no particular deference to the district court's analysis of whether the award is constitutionally excessive, a matter that is treated as a classic "legal" issue, determined with the record evidence viewed in the light most favorable to the jury's verdict. This approach comports with the test adopted by this Court for appellate court review of criminal liability, *see, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and its close analogs used in appellate review of civil liability and of the severity of criminal and civil penalties. *Jackson*'s "rational factfinder" approach is appropriate for appellate review of jury-awarded punitive damages, as this Court strongly implied in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

Other circuits, in articulating a standard of review for punitive damage awards, have departed from this traditional "rational factfinder" approach. Rather than examining the record *de novo* to determine whether the result reached by the jury was rational, the Eleventh Circuit uses a standard of review that defers to so-called "factual" findings made by district courts concerning the level of reprehensibility of the defendant's conduct and other key factors bearing on the ultimate legal issue of gross excessiveness. This approach creates twin risks. One is the risk of undue interference with rational jury verdicts (as district courts enjoy leeway to throw out verdicts that would be found rational on *de novo* review). The other is the risk of approval of irrational jury verdicts (as district courts enjoy leeway to uphold verdicts that would be found irrational on *de novo* review).

The Third Circuit has gone the opposite way in its departure from the traditional standard of *de novo* review of a jury verdict's rationality. The Third Circuit reads this Court's precedents as requiring appellate judges to engage in "intensive review" of punitive damage awards, and to use their own experience and judgment to ensure that only appropriate awards are upheld. This expansive review standard violates statutory

and constitutional strictures on the scope of federal appellate review of jury verdicts.

The approach followed by the Ninth Circuit is difficult to discern with precision. But regardless of how this Court reads Ninth Circuit law, this Court should grant review in this case to resolve the conflict among the federal circuit courts of appeals concerning the proper standard for reviewing federal substantive due process attacks on jury-awarded punitive damages. The proper standard of appellate review is an important and frequently recurring matter that should be addressed and resolved at the earliest available opportunity.

ARGUMENT

CERTIORARI IS WARRANTED IN LIGHT OF THE CONFLICT AND CONFUSION AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS CONCERNING THE REVIEW OF JURY-AWARDED PUNITIVE DAMAGES

The Eleventh Circuit recently suggested that the issue of the proper appellate standard of review for federal substantive due process attacks on jury-awarded punitive damages is an "issue of first impression" nationally. *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). We disagree. Although the precise standard used by each circuit is difficult to define with precision, and although some circuits have not specifically addressed this issue, it is plain that an important circuit conflict exists as to the standard of review.

The three different approaches are these: (a) under the approach of several circuits, *de novo* review of what is termed a "legal" issue under a "rational factfinder" standard, which we believe is the correct approach; (b) under the Eleventh Circuit's approach, a nominally *de novo* review framework, coupled with deferential review of district court "factual" findings; and (c) under the Third Circuit's approach, an "intensive review" of the punitive damage award, conducted with the benefit of the

appellate judges' own experience and judgment concerning what size award is reasonable. We describe each approach and briefly summarize why we believe the first approach is the correct one, and why certiorari is warranted in this case to resolve the issue.

A. Several Circuits Engage in *De Novo* Review of Whether the Jury's Award is Rationally-Supportable on the Record, Consistent With the Traditional Standard of Review for Both Criminal and Civil Jury Verdicts

At least four federal circuit courts of appeals — the Second, Seventh, Eighth and Tenth Circuits — appear to engage in *de novo* review of whether the amount of punitive damages awarded in a particular case is rationally supported by the record evidence, using a standard akin to the "rational factfinder" standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and related cases. Typically, this *de novo* review is conducted under an "abuse of discretion" rubric. Review for "abuse of discretion" is nominally involved because this is the label traditionally attached to review of a district court's ruling on a new trial motion (the device used to challenge the size of a jury's damage award). But there is no discretion actually accorded the district court. Rather, in these circuits, excessiveness is treated as a "legal" question, decided on the record with all legitimate factual inferences drawn in favor of the jury's result, and a district court perforce abuses its discretion in upholding a verdict that lacks rational support in the record.

More than a decade ago the Seventh Circuit, in *Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987), reiterated settled precedent that it would find a punitive damage award excessive on appeal only if there is "'no rational connection between the evidence on the damages and the verdict,'" and in that case it upheld the punitive award on the finding that it did "not seem irrational." *Id.* at 686.

Likewise, the Eighth Circuit, in *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259 (8th Cir.), *cert. denied*, 513 U.S. 989 (1994), indicated that a punitive damage award should not be

disturbed based on a gross excessiveness analysis unless the amount awarded "was so unrealistic that it showed irrational rather than reasonable jury behavior." *Id.* at 1266 (citation omitted). The Eighth Circuit reinstated in full the jury's $2.7 million punitive damage award that the district court had found excessive, based on the Eighth Circuit's own conclusion, after a review of the record, that there was no indication that the award "could only have resulted from irrational jury behavior." *Id.* The court applied *de novo* review of the jury's underlying award, under a "rational factfinder" standard, and there was no deference to the district court's analysis of the amount of the award. Recently, the Eighth Circuit explicitly held that in reviewing federal substantive due process challenges to punitive damage awards, it will "review the district court's conclusions de novo." *United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000).[2]

Likewise, in *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), the Second Circuit explained that in reviewing a punitive damage award "for abuse of discretion," it decides a "question of law" concerning the "upper limit" supported by the record, to determine whether the amount of the award is "rational." *Id.* at 808-09 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996), and *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992)). It applied this standard to a prison beating case and held that the maximum punitive damage award supported by the record was $75,000 (as opposed to the $200,000 awarded by the jury and upheld by the district court). In doing so, the Second Circuit decided the federal substantive due process attack on the

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[2] A case cited in *Big D* to illustrate the nature of the *de novo* review being used, *see* 184 F.3d at 933, confirms the limited nature of this review. In that case, *Midland Banana & Tomato Co., Inc. v. United States Dep't of Agric.*, 104 F.3d 139, 142 (8th Cir.), *cert. denied*, 522 U.S. 951 (1997), the Eighth Circuit relied on the rule that "[w]e review federal constitutional questions de novo." *But see Thorne v. Welk Inv.*, 197 F.3d 1205, 1211-12 (8th Cir. 1999) (reviewing punitive damage award upheld by district court "for an abuse of discretion" and finding "no abuse of discretion with regard to the remitted amount of punitive damages").

verdict based on a *de novo* review of the inferences supported by the record, without any deference to the district court's view of the record. *Id.* at 809-13.

Finally, it appears that the Tenth Circuit also applies a *de novo* standard of review, under which no deference is owed to the district court and the sole issue is whether, drawing all legitimate factual inferences in favor of the jury's verdict, the amount of the punitive damage award is irrationally excessive. In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), the court stated that whether a given award violates federal substantive due process is "a federal constitutional issue" that is "one of constitutional fact that the appellate courts have the power to decide" based on their "review of the record." *See also Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228-31 (10th Cir. 2000); *FDIC v. Hamilton*, 122 F.3d 854, 857, 861-62 (10th Cir. 1997).

The *de novo* review under a "rational factfinder" standard employed by these four circuits is, we submit, the correct approach. "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 469 (1993) (Kennedy, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). Federal appellate review of jury-awarded damages to ensure that a particular award is rational on the record of the case is hardly a novel development. For example, even during the 1960s, when the existence of any federal appellate authority to review excessiveness claims was a matter of considerable dispute, *see, e.g., Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir.) (Blackmun, J.), *cert. denied*, 369 U.S. 929 (1961), the Fifth Circuit emphasized that the function of appellate review in this context was to decide whether the district court had abused its discretion in upholding a verdict that was without rational support on the record. In *Glazer v. Glazer*, 374 F.2d 390 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967), the court struck down a $1.9 million compensatory award

for breach of contract. In doing so, it stated that the district court had abused its discretion because "[t]he verdict was excessive *as a matter of law* in that it exceeds any *rational* appraisal or estimate of the damages that could be based upon the evidence before the jury." *Id.* at 413 (emphasis added).[3]

This "rational factfinder" standard for reviewing the underlying jury verdict for rationality, with the record viewed in the light most favorable to the verdict and with no particular deference to the trial judge, is of course a familiar one. In criminal litigation it has long been settled that where a defendant challenges the adequacy of the evidence introduced at trial, the proper test on appellate review (and on habeas review of state court proceedings) is whether "a rational factfinder" could have arrived at the jury's result under the governing law and facts. *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979). *Jackson*'s "rational factfinder" test is an objective one that focuses on the corpus of evidence that was before the jury. It "does not permit a court to make its own subjective determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached" based on "scrutiny of the reasoning process actually used by the factfinder — if known." *Id.* at 319-20 n.13. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus

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[3] A linkage between the "abuse of discretion" *label* for review of an order on a motion for a new trial, and the "rational factfinder" *substance* of the review of a compensatory damages award, has persisted to this day. *See, e.g., Mejias-Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 427-29 (1st Cir. 1997) (stating that under *Gasperini*'s abuse-of-discretion review standard, a district court's denial of a new trial on damages will be overturned "only if the damages awarded lack 'a rational basis in evidence,'" and concluding that the $25,000 award for medical expenses "lacked any rational basis" in the record) (citation omitted); *Air Safety, Inc. v. Roman Catholic Archbishop*, 94 F.3d 1, 4 (1st Cir. 1996) (stating that the proper scope of review "is narrow" and that "an abuse of discretion" cannot be found where "the jury award has a rational basis in evidence") (citation omitted).

"imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. The question it poses to a reviewing court is simple. "Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not." *Schlup v. Delo*, 513 U.S. 298, 330 (1995).[4]

Jackson involved the review of evidentiary sufficiency to sustain a criminal conviction. But a close variant of the *Jackson* standard has traditionally applied to appellate review of liability determinations in civil litigation as well. This Court articulated

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[4] The "rational factfinder" test plainly does not involve any sort of weight-of-the-evidence review of the jury's verdict. In *Tibbs v. Florida*, 457 U.S. 31 (1982), the Court stated that the *Jackson* test "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt," so that "[t]he Due Process Clause . . . sets a lower limit on an appellate court's definition of evidentiary sufficiency," but it emphasized that "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Id.* at 45 & n.21 (quoting *Jackson*, 443 U.S. at 319). *See also Herrera v. Collins*, 506 U.S. 390, 402 (1993) (review under *Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal").

According litigants the right to appellate weight-of-the-evidence would impose on appellate courts in every case the burden "to examine in some detail all of the evidence," rather than simply to confirm that the jury's result is supported by "adequate evidence in the record." *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995). This would duplicate work already competently done by trial judges and inevitably undermine confidence in trial judges. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 781-82 (1957). And by encouraging disappointed litigants to appeal in an effort to re-try the facts, it would lead to greater docket congestion and less time for attention to serious issues of law. *See* Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Tex. L. Rev. 949, 967-68 (1964); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2d* § 2819, at 204 (2d ed. 1995).

the general approach decades ago as follows:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

Brady v. Southern Ry., 320 U.S. 476, 479-80 (1943). This Court explicitly introduced *Jackson*'s "rational factfinder" language into the summary judgment context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in stating that, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and in emphasizing that the inferences that may be drawn from the facts must be "'viewed in the light most favorable to'" the nonmovant. *Id.* at 587 (citations omitted). In civil litigation, the federal appellate courts now routinely refer to the "rationality" of a finding of liability when they engage in *de novo* review of the corpus of record evidence in reviewing summary judgment and JMOL rulings.[5]

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[5] *See* David G. Knibb, *Federal Court of Appeals Manual* § 30.2, at 526 (4th ed. 2000). An electronic search of decisions in the past decade reveals that at least ten of the twelve federal circuit courts of appeals employ the "rational factfinder" test in their *de novo* review of summary judgment and/or JMOL rulings. *See, e.g., Doby v. Decrescenzo*, 171 F.3d 858, 873-74 (3d Cir. 1999); *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998); *Tuohey v. Chicago Park Dist.*, 148 F.3d 735, 740 (7th Cir. 1998); *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998); *Gremmels v. Tandy Corp.*, 120 F.3d 103, 105 (8th Cir. 1997); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1121 (11th Cir. 1997); *Pierce v. Atchison T. & S.F. Ry.*, 110 F.3d 431, 438 (7th Cir. 1997); *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 107-08 (2d Cir. 1997); *Waymire v. Harris County*, 86 F.3d 424, 428 (5th Cir. 1996); *United States v. 121 Allen Place*, 75 F.3d 118, 120-21 (2d Cir. 1996); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 187 (5th Cir. 1995); *Gulf South*

The "rational factfinder" standard also appears at the penalty stage in criminal proceedings. For example, in the capital punishment context, in deciding whether the record supports a finding of a particular death-qualifying "aggravating circumstance," the "appropriate standard of review is the 'rational factfinder' standard established in *Jackson*." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). *See also id.* at 781-84; *Sawyer v. Whitley*, 505 U.S. 333, 339-41, 345-47 & n.14 (1992) (citing *Jackson* in reference to the "innocent of death" doctrine in the context of successive habeas claims).

In a related vein, in reviewing whether particular criminal sentences are in violation of the Eighth Amendment's ban on "cruel and unusual punishments," this Court treats the issue as "legal" in nature, reviewable *de novo*, with no particular deference to the trial court's view of the matter. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 985-90, 994-96 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.); *id.* at 996, 1001-08 (opinion of Kennedy, J., joined by O'Connor and Souter, JJ.); *Solem v. Helm*, 463 U.S. 277, 283, 290-300, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 275-82 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958); *Weems v. United States*, 217 U.S. 349, 362-68, 377, 380-82 (1910).[6] The Court has

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Medical & Surgical Inst. v. Aetna Life Ins. Co., 39 F.3d 520, 521 (5th Cir. 1994), *cert. denied*, 516 U.S. 814 (1995); *Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994); *Alvarez-Crespo v. Olavarria-Rivera*, 994 F.2d 35, 36 (1st Cir. 1993); *Smith v. American Nat'l Red Cross*, 1992 WL 357850, at *2 (4th Cir. 1992); *In re Wade*, 969 F.2d 241, 248 (7th Cir. 1992); *Premier Bank v. Mosbacher*, 959 F.2d 562, 566 (5th Cir. 1992); *Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1069-70 (6th Cir. 1991); *T. Harris Young & Assocs., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 821, 828 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *In re Merritt Logan, Inc.*, 901 F.2d 349, 366 (3d Cir. 1990); *Taylor v. List*, 880 F.2d 1040, 1044-45 (9th Cir. 1989).

[6] The federal circuit courts of appeals have understood that the review of Eighth Amendment challenges is to be conducted *de novo*. *See, e.g., United States v. Flowal*, 163 F.3d 956, 963 (6th Cir. 1998), *cert. denied*, 526 U.S. 1093 (1999); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998);

adopted a similar review standard with respect to criminal forfeitures. *United States v. Bajakajian*, 524 U.S. 321, 336-37 & n.10 (1998).

In reviewing whether particular instances of civil fines are constitutionally excessive, this Court has likewise treated the issue as "legal" in nature and reviewable *de novo*, with no particular deference to the views of lower courts or administrative agencies concerning the ultimate constitutional issue of excessiveness. *See, e.g., St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909).

Finally, the "rational factfinder" standard that is employed by most of the federal circuit courts of appeals that have articulated a review standard likewise finds solid support in this Court's decisions during the past decade addressing federal substantive due process challenges to punitive damage awards. In all three cases, the Court treated the "gross excessiveness" issue as a "legal" one, reviewable *de novo* with the record read in the light most favorable to the jury's verdict, with no particular deference to the views of the district court. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-86 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458-62 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co. v. Haslip*, 400 U.S. 1, 12, 18-24 (1991). Further, in a decision holding that some degree of judicial review of the size of punitive damage awards is required by the Due Process Clause of the Fourteenth Amendment, this Court strongly implied that *Jackson*'s "rational factfinder" approach is the appropriate review standard for "gross excessiveness" claims. *Honda Motor Co. v. Oberg*, 512 U.S.

United States v. DeLuca, 137 F.3d 24, 40 n.19 (1st Cir.), *cert. denied*, 525 U.S. 874 (1998); *Leslie v. Doyle*, 125 F.3d 1132, 1134 (7th Cir. 1997); *United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, 511 U.S. 1041 (1994).

415, 432 & n.10 (1994) (citing *Jackson*, 443 U.S. at 324). *See also* Tr. of Oral Argument in *Honda Motor Co. v. Oberg*, No. 93-644 (Apr. 20, 1994), 1994 U.S. Trans. LEXIS 150, at *13-14 (questioning by Justice O'Connor as to "why should the constitutionally mandated review be any more than is required in a criminal case" under "the *Jackson* standard," leading petitioner's counsel Andrew L. Frey to state: "I have no problem with that standard. That's what we would like to see the Court supply.").

B. The Eleventh Circuit Improperly Defers to "Factual" Findings Made by District Courts in Reviewing Jury Verdicts, Carrying With It the Twin Risks of Undue Interference With Rational Jury Verdicts, and the Approval of Irrational Jury Verdicts

By contrast to the several circuits that apply the traditional "rational factfinder" standard in assessing jury verdict, giving *de novo* consideration to whether a punitive damage award is rationally sustainable on the particular record of the case, the Eleventh Circuit has adopted a standard that requires, in part, improper deference to district court findings.

By and large, the Eleventh Circuit appears to follow the "rational factfinder" approach used by most circuits, treating the issue of whether a particular punitive damage award violates federal substantive due process as a "legal" issue subject to *de novo* review. The Eleventh Circuit disclaims any "abuse of discretion" label, thus making clearer than other circuits that, in general, a *de novo* review standard applies. Thus, in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999), the court stated that under this Court's decisions

> there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture. The abuse of discretion standard is inapplicable where no discretion may be exercised.

> The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*.

Id. at 1334.

Up to this point, the Eleventh Circuit's *Johansen* decision is straightforward, with the court endorsing *de novo* review of a jury verdict awarding punitive damages, conducted through a review of the underlying record viewed in the light most favorable to the verdict, without deference to the district court. But the court then adds a caveat that creates a curious hybrid standard of review: rather than deferring on factual matters to *the factfinder* on the case, that is, the jury, the Eleventh Circuit defers to the posttrial analysis of *the district court* that reviewed the jury's verdict, "accept[ing] the district court's findings of fact unless they are clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a). *Id.*

We are aware of no authority for such a standard of review. The only case cited by the Eleventh Circuit on this point is this Court's decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), in which the Court conducted an excessiveness analysis of a criminal forfeiture imposed by a district court after a bench trial and confirmed the basic rule that although excessiveness determinations are "legal" issues reviewed *de novo*, the evidence must be viewed in the light most favorable to the result reached by the factfinder — there, the district court that conducted the bench trial and issued Rule 52(a) factual findings. *Id.* at 336-37 & n.10. We are at a loss to understand how *Bajakajian* could be construed to support the proposition that if a district court issues an opinion on a posttrial motion finding that a jury's award of punitive damages violates federal substantive due process, on appeal there will no longer be "rational factfinder" review of whether the record before the jury supports the ultimate verdict, but instead the district court's opinion will be given the status of Rule 52(a) findings — thereby rendering irrelevant the fact that it is a jury verdict, not a bench trial finding, undergoing review. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992) (rejecting

proposed borrowing of Rule 52(a) standard in another context involving review of jury verdicts).

Apart from the conceptual inappropriateness of the Eleventh Circuit's mixing of two separate appellate review standards — that used to assess the rationality of a jury's verdict, and that used to assess the validity of explicit factual findings made at the conclusion of a bench trial — this approach creates twin risks of aberrant results. Under the "rational factfinder" review standard used by most circuits, either the jury's punitive damage award is rational, in which case it is upheld, or it is not rational, in which case it is struck down. *Cf. Schlup v. Delo*, 513 U.S. 298, 330 (1995) (stating that under the *Jackson* test, the question of whether the jury's verdict could have been reached by a rational factfinder "requires a binary response"). Under this approach, there is no risk of undue interference with jury verdicts (as *only* irrational jury verdicts are struck down) and no risk of the approval of irrational jury verdicts (as *all* irrational jury verdicts are struck down).[7]

The Eleventh Circuit's approach creates a risk of approval of irrational jury verdicts: even where the appellate court on *de*

[7] We hasten to add that this *de novo* standard of review, which ensures that all irrational verdicts are struck down on federal substantive due process grounds, but that no rational verdicts are struck down on such grounds, is relevant in only a tiny percentage of cases, and that this standard does not place trial judges in a legal straightjacket. The vast bulk of jury verdicts raise no colorable excessiveness concern. Further, as a practical matter, most verdicts that are constitutionally problematic are reduced by trial judges in the exercise of an entirely different source of power to control aberrant verdicts. Throughout our nation's history, federal trial judges have enjoyed broad authority to grant new trials, both as to liability and damages, through the exercise of their power to sit as the "thirteenth juror," weighing the evidence to decide whether a new trial is in the interests of justice. As we and others have argued at length elsewhere, this power of the trial judge to alter jury verdicts based on a weight-of-the-evidence analysis is exclusive to trial judges and is effectively immune from control by appellate courts. *See* Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner, in *Gasperini v. Center for Humanities*, No. 95-719 (filed March 1, 1996) (hereinafter "*Gasperini Amicus* Br.").

novo review would conclude that the result reached by the jury is irrational and hence in violation of federal substantive due process, the verdict can nonetheless be upheld on the basis of factual findings made by the district court, to which the appellate court will defer. This approach also creates the opposite risk of undue interference with rational jury verdicts: even where the appellate court on *de novo* review would conclude that the result reached by the jury is rational, the district court can make factual findings striking down the verdict, to which the appellate court will also defer. We see no basis for the hybrid review standard created by the Eleventh Circuit, and the use of the standard raises troublesome concerns of practicality and fairness that merit consideration in the context of the instant case. (The petition for certiorari in *Johansen*, which this Court denied, raised no standard-of-review issue.)

C. The Third Circuit Improperly Employs "Intensive Review," in Violation of Both Statutory and Seventh Amendment Strictures on the Scope of Federal Appellate Review of Jury Verdicts

The appellate review standard applied by the Third Circuit is even more aberrant and in conflict with fundamental strictures on the scope of appellate review than is the Eleventh Circuit's approach. The Third Circuit's leading case is *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 791 (2000). Unlike most circuits, which defer to juries under the "rational factfinder" standard, and unlike the Eleventh Circuit, which also defers to district courts on factual aspects of posttrial rulings that are not clearly erroneous, the Third Circuit exhibits little if any deference to either the jury or the district court in evaluating federal substantive due process attacks on jury-awarded punitive damages.

As the Third Circuit announced in *Inter Medical Supplies*, it has taken on what it terms a "challenging" role: "The role of gatekeeper" over sizable punitive damage awards. *Id.* at 450. In

its view, this "is not an enviable task," and it has "searched vainly in the case law for a formula" with which to pass on such attacks but has "not found one." *Id.* at 468. Making no reference to the traditional "rational factfinder" standard of review, the Third Circuit appears to engage in some version of weight-of-the-evidence review (see note 4, *supra*) whose results vary depending on the composition of the panel that hears a case. In deciding the upper limit of punitive damages in a case, each Third Circuit panel "must rely on its combined experience and judgment" and, when its members disagree, "they must seek an accommodation among their views" concerning what is "the proper, reasonable punitive damages award." *Id.* Such "intensive review" of punitive damage awards, the Third Circuit believes, is required by this Court's jurisprudence. *Id.* at 470. Using this "intensive review" standard, two members of the *Inter Medical Supplies* panel reduced a punitive damage award in an intentional tort case by 98%, from $50 million to $1 million, a tiny fraction of the $48 million in compensatory damages upheld by the Third Circuit. *Id.* at 460-61, 463, 467-69. The dissenting judge, arguing that the majority's reduction had "no principled basis," and that the majority was using an inappropriate review standard, would have upheld the $50 million punitive award. *Id.* at 471-72 (Garth, J., dissenting).

The Third Circuit's review standard violates fundamental strictures on the scope of federal appellate review of jury verdicts. Instead of limiting itself to a review of whether the jury's damage award is rational on the record of the case, the Third Circuit appears to engage in weight-of-the-evidence review of the *factual* issue of what is the "proper" or "reasonable" amount of punitive damages in a particular case. As we and others explained in an *amicus* brief filed in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this form of federal appellate review is entirely improper. *See Gasperini Amicus* Br., *supra* note 7. Appellate weight-of-the-evidence or *de novo* review of factual issues has been barred by statute since the enactment of the Judiciary Act of 1789, § 22, 1 Stat. 84-85, to the present day, *id.* at 22-24, a statutory structure which is both

compatible with basic fairness to litigants and which promotes efficiency. *Id.* at 24-30. Even more fundamentally, this sort of "intensive review" practiced by the Third Circuit has been barred by the Re-Examination Clause of the Seventh Amendment since the enactment of the Bill of Rights in 1791. *Id.* at 4-21. As we have argued previously:

> This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Id. at 19 (quoting *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887), and citing *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915)).

In *Gasperini*, the Members of this Court disagreed over whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages (that is, although not a preset cap, what amounted to a "soft cap" dependent in part on the facts of the case) that could be applied by the district court, followed by appellate review for "legal" error under an abuse-of-discretion standard. But as we read the *Gasperini* opinions, no Member of the Court disputed that the Seventh Amendment bars a federal appellate court from engaging in weight-of-the-evidence review. The dispute in *Gasperini* was simply over whether the New York statute should be viewed by federal district courts as imposing a "soft cap," with federal appellate courts properly policing the outer boundaries of district court rulings applying this cap, or whether instead such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing

of jury verdicts. *See Gasperini*, 518 U.S. at 434-38 (opinion of the Court) (viewing New York statute as imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis and therefore reviewable on appeal as a matter of law); *id.* at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

Under *Gasperini*, we submit, the invalidity under the Seventh Amendment of the "intensive review" standard used by the Third Circuit is clear. By contrast, it would appear (especially in light of *Gasperini*) that the "rational factfinder" standard of review for punitive damages followed by most circuits is compatible with the Seventh Amendment. Thus, in our *amicus* brief in *Gasperini* we confined our argument to a demonstration of the impermissibility of any weight-of-the-evidence review in civil cases by federal appellate courts, raising no question as to "whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process 'reasonableness' standard." *Gasperini Amicus* Br. at 20 & n.19 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), and *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.)).

D. Although the Approach of the Ninth Circuit is Not Entirely Clear, This Case is an Appropriate Vehicle for Review of the Circuit Court Conflict

The approach followed by the Ninth Circuit at present seems unclear. *See* Pet. at 9-10 & n.8; Pet. App. at 3a-4a. In the briefing below, the attack of petitioner Cooper Industries, Inc., on the award of punitive damages was premised on the argument that a *de novo* review standard applied. Opening Brief of Appellant filed August 3, 1998, at 2-3, 59-63. Respondent

Leatherman Tool Group, Inc., took the position that an abuse-of-discretion standard applied, and argued that the district court had not abused its discretion in upholding the jury's award of $4.5 million in punitive damages. Brief of Appellee Leatherman Tool Group, Inc., filed Sept. 1, 1998, at 3, 5, 57-65. The Ninth Circuit applied an abuse-of-discretion review standard, specifically holding that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." Pet. App. at 4a. The analysis set forth by the Ninth Circuit in support of this holding, especially in light of its cursory nature, suggests that its standard of review is akin to the deferential standard used by the Eleventh Circuit. There is little if any indication that the Ninth Circuit panel in this case approached the excessiveness issue as do the Second, Seventh, Eighth and Tenth Circuits: by conducting a *de novo* review of the record to determine whether a rational factfinder could have reached the result that was reached by the jury, based on the evidence and instructions that it was given.

Rather, it appears that the Ninth Circuit simply deferred to the result reached by the district court, under a standard that gives district courts even more discretion to rule as they please than that set out by the Eleventh Circuit in *Johansen* (which at least made clear that a district court's ruling on the ultimate issue of gross excessiveness involves a legal determination, subject to *de novo* review). For example, the only two sentences of the Ninth Circuit's decision that squarely address the size of the punitive damage award focus on the "findings" of the district court "that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size and assets," findings that the Ninth Circuit held "were supported by the evidence, such that the award did not violate Cooper's due process rights." Pet App. at 3a.

We do not claim that the matter is free from doubt, and it seems at least conceivable that in spite of this language in the decision below, the Ninth Circuit in fact has a practice, though

one not clearly articulated, of conducting "rational factfinder" review of punitive damage awards, albeit under the rubric of an "abuse of discretion" label. After all, other circuits use an "abuse of discretion" label while in substance reviewing under a "rational factfinder" standard. But regardless of the proper reading of the decision below, it seems clear that there currently exists an important conflict among the federal circuit courts of appeals over what, precisely, an appellate judge is to decide in passing upon a claim that a jury-rendered punitive damage award is grossly excessive. In some circuits, appellate judges ask whether a rational factfinder could have rendered the award on the record and instructions given the jury. In the Eleventh Circuit, appellate judges ask this question but also defer to any factual "findings" made by the district judge on the post-trial motions, treating them like Rule 52(a) findings made at the conclusion of a bench trial. In the Third Circuit, appellate judges give little if any deference to the jury or the trial judge, and instead engage in "intensive review" of punitive damage awards. Whatever is the correct approach, and whatever approach the Ninth Circuit uses, this Court should grant certiorari to ensure that a consistent approach is used nationwide.

CONCLUSION

This Court should grant the petition for certiorari to resolve the important conflict in the circuits over the proper standard of review for federal substantive due process attacks on jury-awarded punitive damages.

Respectfully submitted.

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APPENDIX

QUALIFICATIONS OF *AMICI CURIAE*

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Arthur F. McEvoy III holds a joint appointment as Professor of Law and Professor of History at the University of Wisconsin, Madison, and has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a Research Fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was lead counsel on an *amicus* brief filed by legal historians on that issue that was cited by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994).

Supreme Court, U.S.
FILED
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No. 99-2035

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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RELEVANT DOCKET SHEET ENTRIES FROM
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09/20/96	1	COMPLAINT and JURY TRIAL DEMAND
10/29/96	13	MOTION by Plaintiff Leatherman Tool Grp FOR PRELIMINARY INJUNCTION
11/05/96	33	ANSWER [1-1] and COUNTER-CLAIMS FOR PATENT DECLARATORY JUDGMENT; FALSE ADVERTISING & SHERMAN ACT VIOLATION by Defendant Cooper Industries against Plaintiff Leatherman Tool Group Inc
11/13/96	37	MEMORANDUM by Defendant Cooper Industries IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [13-1] (FILED UNDER SEAL)
11/25/96	48	REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION by Plaintiff to [13-1] MOTION FOR PRELIMINARY INJUNCTION (FILED UNDER SEAL)

12/18/96	75	OPINION AND ORDER – Although this is by no means a clear question, I find that plaintiff has shown a likelihood of success on the merits of its trade dress infringement claims and that irreparable harm should be presumed in addition to finding a threat of actual irreparable harm. Accordingly, plaintiff's motion for a preliminary injunction #13 is GRANTED; defendant's motion or summary judgment on the issue of functionality #26 is DENIED.
12/20/96	78	STIPULATED ORDER GRANTING MOTION FOR ENTRY OF STIPULATED ORDER for preliminary injunction with respect to Defendant's advertising [76-1] ORDERED that Defendant Cooper Industries is hereby preliminarily ENJOINED from using the photographs of a multipurpose tool which appear on Coopers packaging for the ToolZall & Coopers advertising for the ToolZall or any photograph of a Leatherman Tool or components thereof unless the photograph or photographs are clearly & prominently marked to identify the Leatherman Tool Group Inc as the source of the pictured products; Signed 12/19/96 Honorable Malcolm F. Marsh (counsel notified)

12/20/96	78	ORDER by Honorable Malcolm F. Marsh GRANTED IN PART and DENIED IN PART Defendants MOTION FOR CLARIFICATION [77-1] as follows: 1) the Preliminary Injunction against Cooper Tools manufacture of the ToolZall is STRICKEN; Cooper is NOT ENJOINED from manufacture of the ToolZall; Only sales or offers for sale of the product; 2) This injunction applies only to domestic sales or offers for sale of the Cooper ToolZall; 3) Coopers request that the Court specifically identify which individual elements of Plaintiffs tool design are arbitrary and non-functional is DENIED (See formal 2-page Order) Signed 12/19/96 (counsel notified)
06/20/97	162	SECOND MOTION by Defendant Cooper Industries, Inc. FOR PARTIAL SUMMARY JUDGMENT DENYING CLAIM FOR PUNITIVE DAMAGES
07/21/97	198	ORDER by Honorable Malcolm F. Marsh DENYING Defendant's MOTION FOR Rule 26(g) FRCP SANCTIONS [179-1]; GRANTING Defendant's SECOND MOTION FOR JUDGMENT [173-1] ON THE PLEADINGS and DENYING Defendant's MOTION FOR PARTIAL SUMMARY JUDGMENT DENYING CLAIM FOR PUNITIVE DAMAGES [162-1] Signed 7/18/97 (counsel notified)

10/14/97	298	FIRST MOTION by Defendant Cooper Industries FOR JUDGMENT AS A MATTER OF LAW: (No likelihood of confusion as to new ToolZall Tool)
10/14/97	299	SECOND MOTION by Defendant Cooper Industries FOR JUDGMENT AS A MATTER OF LAW: (Punitive Damages)
10/14/97	300	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of their SECOND MOTION FOR JUDGMENT AS A MATTER OF LAW: (Punitive Damages) [299-1]
10/15/97	304	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of MOTION FOR JUDGMENT AS A MATTER OF LAW: (No likelihood of confusion as to new ToolZall Tool) [298-1]
10/16/97	310	MOTION by Defendant Cooper Industries, Inc. FOR JUDGMENT AS A MATTER OF LAW at the Close of all the Evidence
10/17/97	312	Court's JURY INSTRUCTIONS
10/17/97	315	VERDICT (see formal 4 page document)
10/23/97	318	BRIEF re: JUDGMENT, EQUITABLE RELIEF & PUNITIVE DAMAGES by Defendant Cooper Industries in Response to Civil Minutes of Jury Trial [313-1]

10/31/97	323	RESPONSE BRIEF by Plaintiff Leatherman Tool Group, Inc. re: JUDGMENT EQUITABLE RELIEF AND PUNITIVE DAMAGES
11/7/97	324	REPLY BRIEF by Defendant Cooper Industries, Inc. re: JUDGMENT, EQUITABLE RELIEF, AND PUNITIVE DAMAGES
11/17/97	325	JUDGMENT re: Verdict [315-1]; IT IS ORDERED AND ADJUDGED THAT LEATHERMAN TOOL GROUP, INC. has trademark rights in the overall appearance of the LPST; that Cooper shall pay to Leatherman $50,000 as damages for its acts of passing off and false advertising; that Cooper shall pay $4.5 million in punitive damages; that Cooper infringed Leatherman's copyright in a line drawing; that Cooper, its officers, agents, servants, employees and attorneys and those in active concert or participation with Cooper who receive actual notice of this injunction, are hereby enjoined from any further use of Leatherman's line drawing; and that all remaining claims and counterclaims (save attorney fees and costs to be addressed post-judgment) are dismissed with prejudice. Signed 11/14/97; Microfilmed 11/17/97; Honorable Malcolm F. Marsh; (see original 9 page document for further details); (counsel notified)

12/03/97	338	MOTION by Defendant TO REDUCE THE PUNITIVE DAMAGES JUDGMENT in View of Remedial Measures; Oral Argument Requested
12/03/97	339	MEMORANDUM IN SUPPORT by Defendant of MOTION TO REDUCE THE PUNITIVE DAMAGES AWARD [338-1]
12/03/97	344	MOTION (Conditional, in Part, Rule 59) by Defendant Cooper Industries FOR NEW TRIAL; Oral Argument Requested
12/03/97	345	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of (Conditional, in Part) Rule 59 MOTION FOR NEW TRIAL [344-1]
12/03/97	346	RENEWED MOTION by Defendant Cooper Industries FOR JUDGMENT AS A MATTER OF LAW
12/03/97	347	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of POST-JUDGMENT RENEWED MOTION FOR JMOL [346-1]
12/15/97	356	MEMORANDUM by Plaintiff Leatherman Tool Grp IN OPPOSITION to Cooper's Rule 59 MOTION FOR NEW TRIAL [344-1]
12/15/97	357	RESPONSE by Leatherman to Cooper's MOTION TO REDUCE THE PUNITIVE DAMAGES AWARD [338-1]

12/15/97	361	RESPONSE by Leatherman to Cooper's POST-JUDGMENT RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW [346-1]
12/24/97	367	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of MOTION FOR JUDGMENT AS A MATTER OF LAW [346-1]
12/29/97	368	REPLY TO Leatherman's RESPONSE by Defendant Cooper Industries re [338-1] MOTION TO REDUCE THE PUNITIVE DAMAGES JUDGMENT
12/29/97	369	REPLY TO RESPONSE by Defendant Cooper Industries re [344-1] MOTION FOR NEW TRIAL
01/07/98	370	ORDER by Honorable Malcolm F. Marsh: Defendant's MOTIONS FOR JUDGMENT AS A MATTER OF LAW [346-1], FOR A NEW TRIAL [344-1] and TO REDUCE THE PUNITIVE DAMAGES JUDGMENT [338-1] are DENIED. IT IS SO ORDERED Signed 1/7/98 (counsel notified)
02/04/98	376	NOTICE OF APPEAL to Court of Appeals by Defendant Cooper Ind. Inc. from the Judgment [325-2]

RELEVANT DOCKET SHEET ENTRIES FROM COURT OF APPEALS

08/06/98	Filed original and 15 copies Appellant Cooper Industries' opening brief (Informal: no) 63 pages and five excerpts of record in 02 volumes [Vol 1 of the Exc is SEALED]; served on 8/3/98 [98-35147, 98-35415]
09/02/98	Filed original and 15 copies appellee Leatherman Tool's 66 pages brief, 05 Suppl Exc. 02 vols., served on 9/1/98 [98-35147, 98-35415]
09/21/98	Filed original and 15 copies Cooper Industries' reply brief, (Informal: no 32 pages; served on 9/15/98 [98-35147, 98-35415]
05/04/99	ARGUED AND SUBMITTED TO William C. CANBY, Thomas G. NELSON, Jeremy Fogel [98-35147, 98-35415]
12/17/99	FILED OPINION: THE PORTION OF THE JUDGMENT THAT GRANTS LEATHERMAN A PERMANENT INJUNCTION IS REVERSED NO COSTS ARE ALLOWED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. William C. CANBY; Thomas G. NELSON; Jeremy Fogel, author.) FILED AND ENTERED JUDGMENT. [98-35147, 98-35415]

12/17/99	FILED MEMORANDUM DISPOSITION: WE AFFIRMED THE PUNITIVE DAMAGE AWARD AND REMAND FOR FURTHER CONSIDERATION OF THE ATTORNEYS' FEES AWARD. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. William C. CANBY; Thomas G. NELSON; Jeremy Fogel, author.) FILED AND JUDGMENT. [98-35147, 98-35415]
01/03/00	Filed original and 50 copies Appellant Cooper Industries petition for rehearing with suggestion for rehearing en banc 12 p. pages, served on 12/30/99 (PNL & ACTIVE JDGS)
03/03/00	Filed order (William C. CANBY, Thomas G. NELSON, Jeremy Fogel): The P/R and the P/R en banc rehearing are denied [98-35147, 98-35415]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEATHERMAN TOOL GROUP, INC.,	)
Plaintiff,	) No. CV-96-1346-MA
vs.	) STIPULATION
	) CONCERNING
COOPER INDUSTRIES, INC.,	) LEATHERMAN'S
	) COPYRIGHT
Defendant.	) CLAIM

The parties hereby stipulate to following concerning Leatherman's claim for copyright infringement against Cooper (Fifth Claim For Relief):

1. Judgment of liability for copyright infringement shall be entered against Cooper;

2. Leatherman will be awarded no damages, costs, or attorney's fees in connection with the copyright claim; and

3. The jury will not be instructed in any respect concerning Leatherman's copyright claim and will not render a verdict on the copyright claim.

Dated: October 6, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEATHERMAN TOOL GROUP, INC., an Oregon corporation Plaintiff, vs. COOPER INDUSTRIES, INC., an Ohio corporation, Defendant.	) Civil No. 96-1346-MA) STIPULATED ORDER FOR PRELIMINARY INJUNCTION WITH RESPECT TO DEFENDANT'S ADVERTISING

Based on the stipulation of the parties, it is hereby

ORDERED that defendant Cooper Industries, Inc., its officers, agents, servants, employees and attorneys, and those in active concern or participation with Cooper who receive actual notice of this preliminary injunction, are preliminarily enjoined from using the photographs of a multipurpose tool which appear on Cooper's packaging for the ToolZall (Exhibit A) and Cooper's advertising for the ToolZall (Exhibits B-D), or any photograph of a Leatherman tool or components thereof, unless the photograph or photographs are clearly and prominently marked to identify the Leatherman Tool Group, Inc. as the source of the pictured product.

DATED: December 19, 1996

/s/
MALCOLM F. MARSH
United States District Judge

Stipulated:

Leatherman Tool Group, Inc.

By: /s/
Bruce Dekock
of Attorneys for Plaintiff

By: /s/
Garth Winn
of Attorneys for Defendant

Instruction No. 39

Leatherman has asked for punitive damages with respect to its unfair competition claim. Punitive damages may not be awarded on Leatherman's claim for trade dress infringement. Punitive damages may be awarded only if you find that Leatherman is entitled to actual and/or compensatory damages on the unfair competition claim. The purpose of punitive damages is to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated for like conduct in the future. Leatherman has the burden of proving by clear and convincing evidence that Cooper acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights. Malice is the intentional doing of an injurious act without justification or excuse. A person acts recklessly when his acts or omissions are done in conscious disregard of the known probable consequences.

In establishing the amount, if any, of punitive damages to award you should consider the following factors:

1. The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims;

2. The defendant's motive;

3. The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and

4. The defendant's income and assets.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEATHERMAN TOOL GROUP, INC., an Oregon corporation, Plaintiff,	
vs.	No. CV-96-1346-MA
COOPER INDUSTRIES, INC., an Ohio corporation, Defendant.	VERDICT

1. Has Leatherman proved by a preponderance of the evidence that it has trademark rights in the overall appearance of the Pocket Survival Tool?

Yes__X__ No_____

If you answered yes, go to question 2. If you answered no, go to question 9.

2. Has Leatherman proved by a preponderance of the evidence that the original ToolZall infringes Leatherman's trademark rights in the Pocket Survival Tool?

Yes__X__ No_____

If you answered yes to question 2, please answer questions 3 and 4.

If you answered no, go to question 5.

3. Was Cooper's infringement willful?

Yes__X__ No_____

4. What amount of damages do you find should be awarded to Leatherman due to the infringement of its trademark by the original ToolZall?

$__0__

5. Does the new ToolZall infringe Leatherman's trademark rights to the Pocket Survival Tool?

Yes_____ No__X__

If you answered yes, go to question 6. If you answered no, go to question 9.

6. Did Leatherman abandon its right to assert trademark rights against the new ToolZall?

Yes_____ No_____

If you answered no, please answer question 7 and 8. If you answered yes, go to question 9.

7. Was Cooper's infringement willful?

Yes_____ No_____

8. What amount of damages do you find should be awarded to Leatherman due to the infringement of its trademark by the new ToolZall?

$_____

9. Has Leatherman proved by a preponderance of the evidence its claim for passing off?

Yes__X__ No_____

10. Has Leatherman proved by a preponderance of the evidence its claim for false advertising?

Yes__X__ No_____

11. Has Leatherman proved by a preponderance of the evidence its claim for unfair competition?

Yes__X__ No_____

If you answered yes to questions 9, 10 or 11, go to question 12. If you answered no to questions 9, 10 and 11, have the presiding juror sign this verdict form and return it to the Courtroom Deputy.

12. What amount of damages do you find should be awarded to Leatherman for Cooper's passing off and/or false advertising?

$__50,000__

If you answered yes to question 11 and if you entered a damage award in response to question 12, please answer questions 13 and 14. If you entered 0 or if you skipped the question, do not answer questions 13 and 14.

13. Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

Yes__X____ No_____

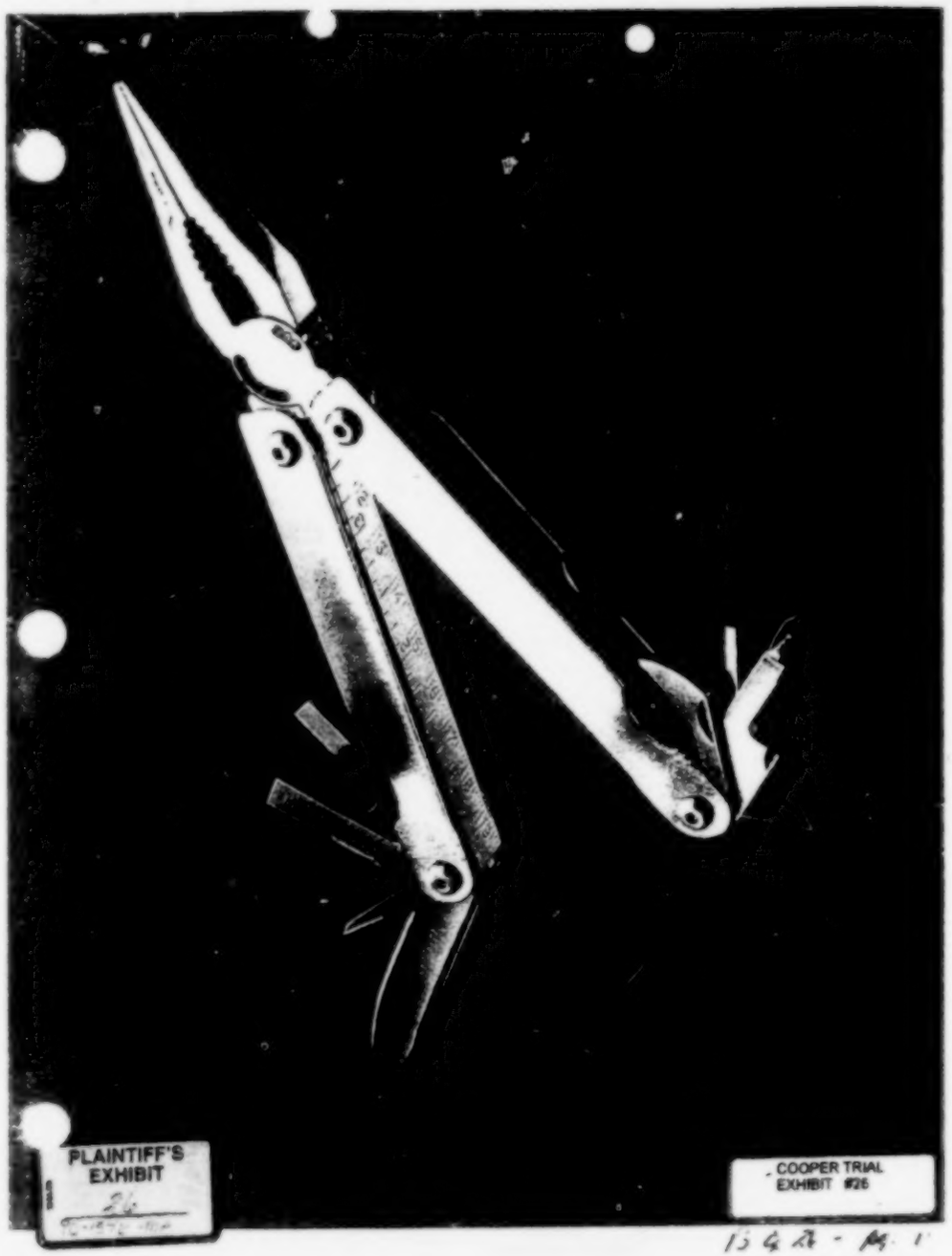
If you answered yes to question 13, please answer question 14.

14. What amount of punitive damages should be awarded to Leatherman?

$____4.5 million___

DATED this 17th Day of October, 1997.

/s/_____
Presiding Juror



COPY: J.
FYI
Rick

NEW PRODUCT: COOPERMAN TOOL

Market :
Domestic: Size: 6M pcs. - $150M+
Growth: 3%

International:
Size: To be determined
Growth:

Opportunity: Introduce an improved tool for the professional industrial market and tool oriented DIY'er

Competition:

Leatherman: Originally invented this line approx 10 years ago. Came out with a basic tool that was intended to be a 9 tools in 1 combination tool that could be carried on the belt. The original intent was to reach the sportsman market. As it turned out, this tool also became the standard tool carried by many tradesman and professionals that have on the go type jobs. Recently, two new products have been developed and introduced - a Mini Leatherman and the Leatherman Ultra Tool. All tools are stainless steel. Leatherman currently produces and sells 200,000 tools per month or 2.4 m per year.

Gerber: As part of their belt knife program, entered this market during the past five years. Their tool is similar in many ways, but different enough to circumvent the Leatherman patents. They do approximately 1.5 -- 2m units annually, primarily to the sporting goods market.

SOG: Make a similar tool to that made by Gerber.

Low priced competition: A few similar, but larger products have recently entered the market selling at retail in the $19.99 range. These appear to be crude, heavy type knock-offs that in all probability are not selling well.

Product Line: To be a player we would need to produce at the Leatherman quality level, at prices in the Leatherman range (Distr price $27-$28 - reg tool and $10 more for the Ultra tool) Our product will need to be differentiated, with somewhat improved attributes and features. Since all of the Leatherman components are out sourced, we should have an expected manufacturing advantage on many of the parts.

Market: Our customers generally sell this type of product on an over the counter basis, as do they the Leatherman Tool. By my estimate, all things being equal, our programs – should be tie breakers in many of our industrial accounts

Attorneys' Eyes Only

C000241

PLAINTIFF'S EXHIBIT 67

67 C000241-243

BEST AVAILABLE COPY

In addition, there is a large GSA contract for 100,000 pcs issued annually.

Our take @ 5% of the Leatherman market should in the $3M range
Desired Market Position Plan:

- o Take 5% of Leatherman sales in year two. All to come from the industrial side.
- o Quote GSA business at break-even or better margin to secure base volume
- o Enter catalog sales area thru Reps to reach outdoorsman side of market.

Expect 1/2 of 1% (Gerber/SOG sales) $350-400K in sales 1st year. 3% sales growth in years two thru seven. ?

Preliminary Cost Estimate:
Std Cost: $14.15
Tooling: $119,000.

Startup: 8 months from approval.

75000 units

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Attorneys' Eyes Only
C000242

Chisholm & Associates

RALEIGH · LONDON

June 10, 1996

Mr. Pete Jones
CooperTools
P.O. Box 30100
Raleigh, NC 27622

RE: PROTOTYPES

Dear Pete:

Enclosed please find the two prototypes requested. Again, due to scheduled photo shoots for these products, we will need to have these back no later than June 12 A.M.

If you should have any questions please feel free to call.

Sincerely,

Tara Reid

Tara Reid

Enclosures

cc: Bill Bliss
David Sendall
Alfred Chisholm
Holly Young 6193-US

PLAINTIFF'S EXHIBIT 100 CV 96-134-M4

PLAINTIFF'S EXHIBIT NO. 14 FOR IDENTIFICATION DATE: 9/4/2001

COOPER TRIAL EXHIBIT #100

C&A0177

4505 Falls of Neuse Rd.
Suite 650
Raleigh, NC 27609
919.876.2065
Fax 919.876.2344

William R. Bliss
Manager, Marketing Services

Cooper Industries
Cooper Hand Tools Division
3535 Glenwood Avenue
Raleigh, NC 27622
Office (919) 783-2013
Marketing Fax (919) 783-2067

FAX TRANSMISSION

COOPER
CooperTools

1 page (including cover sheet)

DATE: November 20, 1996

TO: CooperTools Sales Personnel

FROM: Bill Bliss

SUBJECT: ToolZall Literature Recall

At the request of Cooper Industries attorneys, we are recalling stocks of selected literature pieces that have been distributed and are being stored by you. **This recall does not affect any literature that you have already given to your customers and is in their possession.** Revised reprints of 55074 and 55139 will be in stock by 12-6-96. Item 55184 will not be reprinted; suggested replacements are items 55902 or 55845. All other items will be revised and reprinted by mid-December.

The following inventory form should be completed and included with the materials to be returned. The package should be sent to the following address to arrive no later than Monday, December 2:

COOPERTOOLS
3535 Glenwood Avenue
Raleigh, NC 27612 Attn: Jean Wheless

Salesperson_____ Territory_____

Item Number	Description	Quantity Returned
55074	ToolZall 4-page Brochure	
55139	ToolZall Imprint Flyer	
55184	Industrial Imprint Flyer	
55119	QuickFire 4-page Brochure	
55069	QuickFire 4-page Brochure (Spanish)	
55132	MultiMaster 4-page Brochure	
55070	MultiMaster 4-page Brochure (Spanish)	
55054	Fall 1996 New Products Brochure	
55047	Fall 1996 New Products Brochure (Spanish)	

PLAINTIFF'S EXHIBIT
217
96-1346-MA

ATTORNEY'S EYES ONLY

C005762

Leatherman v. Cooper Industries
Toolzall Profit and Loss
International and Domestic

	1996	Through July 1997	Total
Net Trade Sales (1)	$ 287,343	$ 197,822	$ 485,165
Cost of Sales at Standard (2)	$ 180,495	$ 140,216	$ 320,711
Manufacturing Variances on Product Sold (3)			$ 114,000
Gross Profit			$ 50,454
Capital Expenditures (4)	$ 303,496	$ -	$ 303,496
Inventory:			
WIP at Standard (5)	$ -	$ 664,036	$ 664,036
Finished Goods at Standard (6)	$ -	$ 322,896	$ 322,896
Manufacturing Variances (3)			$ 114,916
Plant Support (7)	$ 45,707	$ 36,018	$ 81,725
Selling and Marketing (7)	$ 41,695	$ 33,921	$ 75,616
General and Administrative (7)	$ 12,044	$ 12,378	$ 24,422
Total Loss on Product			$ (1,536,653)

Sources:

(1) 1996 Net Trade Sales Bates # C008239, #C008240 and # C008241
1997 Net Trade Sales Bates #C008238 and #C008255

(2) Toolzall Profit Analyses - 1997 July YTD Bates #C008238
ToolZall Profit Analyses - 1996 Bates #C008237

(3) Departmental Expense Report Bates #C6995 - #C7000; ToolZall proportional allocations taken from discussions with Cooper

(4) Bates #C7003

(5) Bates #C008263

(6) Bates #C008235

(7) Bates #C008235

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we were just looking at there. Our maintenance manager

asked me if I had ever seen this tool before.

Q. And could you tell the jury what is Exhibit 14?

A. It is an advertisement from MRO Magazine for Wiss and

Crescent depicting a Leatherman tool. That is being touted

as a ToolZall, or being shown as being manufactured by

Cooper.

Q. And were you asked to do any comparison with respect

to that photograph?

A. Yes, I was. The only comparison I randomly did was to

look at it. I immediately concluded it was the same tool

in the photograph that I had seen previously, which, I

believe, it is.

Q. All right. Now, what I would like you to do now is to

turn to what we have marked as Exhibit 26. It should be in

that book as well.

A. Yes, I found it.

Q. What is Exhibit 26?

A. Exhibit 26 is a photograph of a Leatherman tool with

fasteners changed and the name, Leatherman, somehow removed

from the plier jaws.

Q. And do you know where this photograph came from?

A. Yes, I do.

Q. And where did it come from?

A. I have been told this photograph comes from Copper's

advertising agency.

Q. Is that a Leatherman tool?

A. I believe it is.

Q. Okay. If you could turn then to Page 4 of Exhibit 26.

A. Okay.

Q. I want you to look at Page 4 and Page 6 together.

A. 4, yes.

Q. On Page 4 can you tell the difference on Page 4 of Exhibit 26?

A. Page 4 are some handwritten notes and Page 6 is a photograph of a Leatherman tool.

Q. And is there some writing there on Page 4 of Exhibit 26?

A. Yes, there is.

Q. What does it say?

A. It says, retouch out USA and other logo."

Q. And can you tell, Mr. Rivera, I'm going to hand you a negative here that is reflected in Exhibit 26 there. This is the actual entire -- we have been trying to get our gizmo to work and it won't. Have you taken a look at that

photograph before, that entire negative?

A. Yes, I have.

Q. And can you tell the jury what it is?

A. It is a photograph of a Leatherman tool with fasteners

changed and then on it it has the -- it has the same note I

just read with the logo pads on the plier jaws.

Q. Can you see what is being done on the entire negative,

what is being retouched?

A. Yes. It would be the Leatherman where it used to say

Leatherman USA, are going to be retouched to be removed.

Q. And do you know where that entire negative comes from?

A. I have been told this comes from Cooper's advertising

agency also.

Q. All right. I want you to turn now to Pages 24, 26 of

this Exhibit 26. By the way, the photograph that is in

Exhibit 26 that we just looked at, is that the same

photograph that appears in Exhibit 14?

A. Yes, it is.

Q. Now, I'm going to hand you an entire negative here

marked as C4, and ask you if you have taken a look at that

before?

A. Yes, I have.

MS. DAVIS: We got it working now so I can put

it up on the screen.

BY MS. DAVIS:

Q. And when you compare Pages 24 and 26, and you look up

at the entire negative that is shown up on the screen

there, can you tell what is being done there?

A. That photograph is also being retouched.

Q. Is that the same photograph that showed up in Exhibit

A. Exhibit 31 is brochure for Crescent ToolZall line art,

what they call the ToolZall.

Q. Okay. Have you taken a look at that line art before you came here today?

A. Yes, I have.

Q. Is that a ToolZall in that line art or a Leatherman tool?

A. I believe it is a Leatherman tool. The reason I believe that is -- there are a couple of features on the line art that aren't on the ToolZall.

One, if you look closely you see it has Leatherman type nail nick on it. It doesn't have the V-shape spring that the ToolZall finally ended up having.

Q. Okay. If you turn now to what has been marked as Exhibit 32. I think it is 32 in the book there.

A. Yes.

Q. Tell the jury what that is.

A. That is a photocopy of the page that we received for the ToolZall on the package depicting a Leatherman tool with the fasteners changed.

Q. Where did that package come from?

A. That is a package that we bought from Logo Tool and Supply hardware store, basically that our company buys stuff from when we first bought ToolZall.

Q. You bought that on the open market?

Timothy Miller – Cross-Examination (905)

A. When we pulled the advertising?

Q. Well, when you pulled the advertising, you pulled the packaging, when you pulled all of the material that showed the modified Leatherman product you sent a memo out to your sales force, didn't you?

A. Yes, I did.

Q. You sent that out or you had Mr. Bliss send a memo out in November; isn't that right?

A. I believe I sent out a letter to our sales organization in November and Mr. Bliss probably did so too.

Q. Take a look at 217.

A. Okay.

Q. And that is dated November 20, 1996. That is from Bill Bliss and the subject is ToolZall literature recall;

is that correct?

A. That is correct.

Q. It says right there on the front on the first paragraph, read that first sentence.

A. The first sentence, "at the request of Cooper Industries' attorney we are recalling stocks of selected literature pieces that have been distributed and are being stored by you."

Q. Now, that next sentence, that is in bold type, what does that next sentence say?

A. "This recall does not affect any literature that

Timothy Miller – Cross-Examination (906)

you have already given to your customer and is in their possession."

Q. And it is true, Mr. Miller, that in December when you decided you needed to agree to have these promotional materials pulled from the market that you didn't send a

letter out to your customers asking for that back, did you?

A. We did not.

Q. You didn't send a letter out to the mail order catalogs asking for the materials back either, did you?

A. No, we did not.

Q. You didn't send a letter out to your cooperative advertisers asking for their materials back either, did you?

A. No, we did not.

Q. You didn't do any of those things in January of 1996,

did you?

A. No, I don't believe we did.

Q. You didn't do that in February of 1996 -- or 1997, did

you?

A. No, we did not.

Q. You didn't send any kind of recall to the customers,

or the catalog people, or to the cooperative advertisers,

you didn't send that in March either, did you?

A. No, we did not.

Q. And the first time that you ever sent any kind of

notification to the customers, the people that were using these photographs was on April 24, 1997; isn't that true?

A. Well, that would have been -- that was the first time we would have sent a written notice. We asked our salespeople to contact the customers. We prefer one-on-one

contacts to tell them that we are no longer selling the product, and that they should take whatever --

Q. Mr. Miller, thank you for your answer. Isn't it true that you didn't send a letter to these people in this big printout here? You didn't sent a letter to them asking for those materials back until April 24, 1997?

A. That would be correct.

Q. You didn't do that. The only reason you did that is

because I was calling up your lawyers having a cow because

things were showing up in numerous articles all over; isn't

that true?

A. No.

MR. VANDENBERG: Objection, Your Honor.

THE COURT: If you are getting to the communication with attorneys --

MS. DAVIS: No, I'm not, Your Honor.

THE COURT: Okay. Go ahead and answer the question.

THE WITNESS: Repeat the question again.

Alabama, wasn't it? It was in Utah?

A. Utah is different than Alabama, yes.

Q. Since that time, I think it was in April, another 750 fliers were ordered in which it showed the modified Leatherman tool and it said offer expires June 7, 1997;

that happened, didn't it?

A. Yes.

Q. And then in Colorado in April another customer Aviation Inc ordered another 425 fliers that showed the modified tool; isn't that what happened?

A. Yes.

Q. Isn't it true that another customer, beyond those we have already talked about, ordered 250 fliers showing the modified Leatherman tool in April of this year?

A. Would that be the sixth? That is six.

Q. It is a customer in Colorado, I can dig out the name. I have these. There were two customers in Colorado?

A. I believe that is correct.

Q. Okay. And then somebody in Arizona had another 2400 fliers printed up in April of 1997 showing the modified Leatherman tool; isn't that correct?

A. Yes. The customer had fliers printed up, yes.

23 Q. You are also aware that the flier in the line art

24 showing the modified Leatherman tool showed up in a number

25 of national publications between December of 1997 and all

1 of 1997; isn't that right?

2 A. I believe that to be true. We introduced the product,

3 we aggressively tried to put them in fliers.

4 Q. Isn't it true that in those national magazines, you

5 can't tell me how many people have seen the modified

6 Leatherman tool after December of 1996, when you agreed to

7 have that pulled off the market, you can't tell me how many

8 people have seen the modified tool in either magazines,

9 fliers, or newspaper articles, or newspapers

10 advertisements, or brochures, you can't give me a number?

11 A. No, ma'am, there is no way of doing that.

12 Q. Okay. Isn't it true that the last time -- well, would

13 you agree with me that the last time that we both know

14 about that, that showed up was in The Oregonian just August

15 11, 1997?

16 A. I have not seen anything in The Oregonian.

17 Q. You didn't know about The Oregonian?

18 A. I have not seen The Oregonian.

19 Q. Okay. And in December of 1996, I believe you

20 testified to this, if you answered the question I apologize

21 asking it twice. You didn't send a letter to the mail

22 order catalogs telling them don't use the line art, don't

23 use those photographs showing the modified Leatherman tool?

24 A. No, we didn't send a letter to our customers. We sent

25 a letter to our sales organization.

1 Q. And then after all of these adds showed up sometime, I

believe in February of 1997, for some of your packaging and

advertising for the European market, did you use the

photograph again of the modified Leatherman tool?

A. I believe it did show up, yes.

Q. That was something that Cooper Industries did in

November?

A. Our advertising agency designs our packaging with our

approval, of course.

Q. And do you know how many people overseas saw that

package of a ToolZall, or I think you called it a Nicholson

in Europe depicting a modified Leatherman tool, do you know

how many people saw the packaging?

A. No, ma'am, I have no way of knowing that.

Q. Do you know how many people saw those advertising

fliers showing the modified Leatherman tool?

A. I have no way of knowing that.

Q. Do you know when those were recalled by Cooper?

A. I believe the moment we found out that the product was

on there, the mock-up photo was on there we stopped it

immediately.

Q. Did you find out about that when I went to Raleigh

North Carolina and took the deposition of your salesperson,

is that when you first found out?

A. I don't know when.

surprisingly a memo is not addressed directly to him. It is addressed to myself and J. J. Vlietstra, two folks he knew one of them worked for him. So it wasn't directly effecting him, whether he was copied on it. I'm not surprised he read it and discarded it.

But the second reason it also happened -- it wasn't long after that memo that he submitted his resignation to Cooper and he left. So about that time he may have known he was going to leave the company.

Q. Back to the packaging in front of you. And have you looked at the photograph of the tools being used. What do you understand now is depicted in those photographs?

A. Well, we have talked a lot about the mock-up photograph. And the photographs that are here are showing that mock-up, are not the mock-up photograph but the mock-up products. That is what is depicted in this

picture.

Q. Tell us how the mock-up got in those photographs?

A. Well, we talked about mock-ups and how they are requested, primarily requested for initial layouts on advertisement -- this one, and so I later on used mock-ups for initial layouts, and then when you get closer to -- when you are actually going to shot you want to get at least as close to the final product as possible, or if you can get the real product and take the picture of that.

Q. Sent it to your international operations, correct?

A. Yes.

Q. You told people it was a ToolZall, that is right, isn't it?

A. Yes. Obviously it is on the faxcom discussing ToolZall, yes.

Q. You didn't intend to do that, that is what you are

telling us. You didn't intend to use a Leatherman tool to represent a ToolZall when you sent out this faxcom?

A. We sent a drawing that looks like a ToolZall in this case.

Q. And is it true when you sent that drawing to Mr. James you knew that it was going to be put in an international faxcom, didn't you?

A. Yes, I did.

Q. You knew it was going out all over the world?

A. To Cooper's international operations, yes.

Q. You had no idea who it was going to be shown to once it got put out all over the world?

A. Well, it is our understanding the faxcoms are internal documents, not to be shown outside the company.

Q. It is true when you sent that out it did get shown to customers?

A. We have identified four people, or four customers that eventually saw that, yes.

Peter M. Jones – Deposition Excerpt (11)

What did you give to Mr. Meyers?

A. I gave him a -- something very much similar to what you see right there.

Q. Did you give him a picture of a drawing? Is that it?

A. Yeah.

Q. How did you prepare the drawing from the flier, the Leatherman flier?

A. I made a copy of it, cut it out, and gave it to Ray.

Q. By "cut it out," did you cut the drawing out? Is that what you did?

A. Um-hmm.

Q. So you made a photocopy of the Leatherman flier?

17 A. Yes.

18 Q. Did you do anything else to the drawing of the tool

19 in the Leatherman flier before you gave it to

20 Mr. Meyers?

21 A. I removed the term "Leatherman" and any marks that

22 were on the handle.

23 Q. How did you remove marks?

24 A. With White Out.

25 Q. Why did you remove the Leather marks from the

3 drawing?

4 A. We obviously didn't want to show it.

5 Q. Why did you not want to show the Leatherman marks?

6 A. We didn't want any reference to Leatherman.

7 Q. Is that because you wanted a depiction of the

8 ToolZall?

9 A. We wanted a representation of the ToolZall, yeah.

10 Q. Who did you give that drawing to that you prepared

11 from the Leatherman flier?

12 A. To Mr. Meyers.

13 Q. Did you give it to anyone other than Mr. Meyers?

14 A. No.

15 Q. What did Mr. Meyers do with the drawing?

16 A. He had the ability to scan it into our computer

17 system.

18 Q. What do mean by "scan it"? What does that mean?

19 A. I'm not sure what you call it, other than a scanner

20 that can scan a drawing and create a file out of

21 that.

22 Q. So there's the ability to create an electronic

23 file, on the computer system, of the drawing; is

24 that it?

25 Yeah.

Peter M. Jones – Deposition Excerpt (84)

Tool?

MR. WINN: Object. Lack of foundation.

THE WITNESS: No.

BY MR. DEKOCK:

Q. Who would know how many shoots they did?

A. They would, Chism.

Q. Do you know how many different mock-ups of Cooper Tools Chism photographed?

A. Do I know how many photographs or --

Q. How many mock-ups, how many different mock-ups.

A. I don't believe it could be any more than two, if it's even that many.

Q. Did Chism use just one mock-up for the advertisements that it developed for the Cooper Tool?

A. Yes.

Q. Did you ever see that mock-up?

A. I don't remember seeing it.

Q. Did Chism use the same photographs in June and June of the mock-ups for all of the advertisements that it did for the Cooper Tool?

MR. WINN: Object as vague and compound.

THE WITNESS: I'm not sure.

BY MR. DEKOCK:

Peter M. Jones – Deposition Excerpt (124)

BY MR. DEKOCK:

Q. Mr. Jones, before I forget, what I want to do is play for you a portion of the videotape. And we've got a monitor set up here

(Videotaped played.)

BY MR. DEKOCK:

Q. Okay, I paused the videotape, Mr. Jones. Can you identify this videotape for me?

A. This is the new product videotape.

Q. This is the one that you made to compare the Cooper Tool with the other competitor tools?

A. It's the one that we made for the salesmen.

Q. And it's the only videotape you made?

A. Yes.

Q. Right now on the screen there are two tools shown on the videotape. The one on the right has the handles open, showing the pliers and all of the tools folded out. There's a tool on the left that's being held in what appear to be your hands; is that right?

A. Yes.

Q. Do you know what the tool on the left is?

A. It's hard to tell from this. It's hard to tell.

Q. And let me play a little bit more and see if

you can identify it for me.

(Videotape played.)

BY MR. DEKOCK:

Q. Did that help at all, showed you unfolding the tool?

A. It's not a ToolZall. I'm not sure what it is.

Q. Are you able to identify the tool based on the fasteners that are shown there on the tool on the left?

A. I can -- based on the fasteners, I can say it's not a ToolZall.

Q. Can you tell based on the fasteners what kind of tool it is?

A. No.

Q. Isn't it a Leatherman Tool?

A. no, I don't know that.

Q. Is there any other tool that you're aware of

that looks like the tool shown on the left other than a Leatherman Tool?

A. Sorry, say that again.

Q. Is there any other tool that you're aware of that looks like the tool on the left other than a Leatherman Tool?

MR. WINN: I'm going to object to the extent the screen is difficult to see.

Q. So you can't tell me whether they're from a Leatherman Tool, right?

A. Right.

Q. And you can't tell me that it isn't, that the component parts aren't from a Leatherman Tool, right?

A. Say that again.

Q. You cannot tell me that the component parts are not from a Leatherman Tool: is that right?

MR. WINN: Object as vague.

THE WITNESS: Right.

BY MR. DEKOCK:

Q. If you turn the page, on page 3, the first full sentence of it says, "I understand, however, that some components such as the pliers and possibly the knife blade or awl may have been from a Leatherman Tool." How do you have that understanding?

A. The mock-up may include some components from other multi-function tools.

Q. How do you know that?

A. I heard that from Statesboro.

Q. Who at Statesboro told you that?

A. J.J. Vlietstra.

Q. When did Mr. Vlietstra tell you that?

Peter M. Jones – Deposition Excerpt (131)

A. I don't remember the time frame exactly, May or June, somewhere around there.
Q. That was before the lawsuit; was that right?
A. Yes.
Q. Did you know when the mock-up was sent to the advertising agency that it may have contained component parts taken from a Leatherman Tool?
A. I know that it may include components from other multi-function tool manufacturers.
Q. Including a Leatherman Tool; is that right?
A. Yes.
Q. When you were reviewing the advertisements that you saw prepared by Chism for the Cooper Tool, you knew at that time that the photographs of the mock-up – or excuse me, let me flip that – that the mock-up may have contained components taken from a Leatherman Tool; is

that right
(Question read by reporter.)
MR. WINN: Object as vague.
THE WITNESS: Can you say that again?
BY MR. DEKOCK:
Q. Well, you knew in July, when you were reviewing the Chism ads, that the tools depicted may contain components taken from a Leatherman

Peter M. Jones – Deposition Excerpt (132)

Tool; isn't that right?
A. I know that they may contain components from other multi-function tool manufacturers.
Q. Including Leatherman?
A. That may include Leatherman, yes.
Q. And you knew that in July when you were looking at the ads, right?
Yes.
Do you know if the handles of the mock-up were

from a Leatherman Tool?

A. No.

Q. Does anyone know whether the handles in the mock-up were from a Leatherman Tool?

A. I'm not sure.

Q. Is it possible that the handles in the mock-up were from a Leatherman Tool?

MR. WINN: Objection, calls for speculation.

BY MR. DEKOCK:

Q. Answer is yes?

A. Yes, it's possible.

Q. Who would know whether the handles in a mock-up are from a Leatherman Tool?

A. I'm not sure who would know.

Did Mr. Vlietstra tell you why components from

Thad Simmons – Deposition Excerpt (4)

Q. Would you please state your full name for the record and spell your last name?

A. Thad Simmons. S-i-m-m-o-n-s.

Q. Where is your residence address?

A. Post Office Box 28, Rocky Ford, Georgia.

Q. You live in Rock Ford, Georgia?

A. Uh, huh.

Q. So you're represented by Mr. Winn this morning, is that right?

A. That's correct.

Q. Have you ever had your deposition taken before?

A. No, I haven't.

MR. DEKOCK: I'll give you a little brief rundown of what a deposition is about. It's an opportunity for the lawyers to ask questions of witnesses and for the witnesses to give answers to the best of their ability. What we say this morning will be written down so it's

important for us to get clear and audible answers and it's important for you to say "yes" or "no" instead of "uh-huh" or "uh-uh" or nodding. Is that clear?

A. Yes.

Q. If I ask you a question that you don't understand, I'd like you to stop and ask me to explain the question

Thad Simmons – Deposition Excerpt (14)

A. No.

Q. Did you give them to somebody?

A. Yeah.

Q. Who did you give them to?

A. Um . . . J.J.

Q. When did you give the prototypes to Mr. Vlietstra?

A. Again, I don't . . . I couldn't give you a date.

Q. Do you recall anyone ever requesting a prototype to be used for photographing, for advertisements?

A. No.

Q. Did you ever make any prototypes that contained

components from a Leatherman Tool?

A. Yes.

Q. Do you know what happened to those prototypes?

A. No.

Q. How many prototypes did you made that had Leatherman Tool components in them?

A. One.

Q. What components from a Leatherman Tool were in that prototype?

A. The blades.

Q. What do you mean blades?

A. Components that go in . . .

Q. Well, the knife blade . . . was that from a Leatherman Tool?

Thad Simmons – Deposition Excerpt (15)

A. Yeah.

Q. How about the file?

A. Yes.

Q. How about the large screwdriver?

A. Yeah.

Q. Medium screwdriver?

A. Yes.

Q. Small screwdriver?

A. Yes.

Q. Can opener?

A. Yes.

Q. Awl?

A. Yes.

Q. Phillips screwdriver?

A. Yes.

Q. Pliers head?

A. No.

Q. What pliers head was used?

A. I change that . . . plier head, yes.

Q. How about the handles?

A. Yes.

Q. How about the fasteners?

A. No.

Q. What were the fasteners?

A. Star shaped.

Thad Simmons – Deposition Excerpt (16)

Q. Were they like the fasteners shown on the tool on Exhibit #73?

A. They were like the ToolZall fasteners.

Q. Are they like the fasteners shown on the tool in Exhibit #73?

A. I can't really tell from them. It's like the ToolZall.

Q. On this prototype that had the Leatherman components on it, were there any Leatherman trademarks on that tool?

A. No.

Q. What happened to the Leatherman trademarks?

13 A. They were ground off.

14 Q. So the Leatherman mark on the pliers head was

15 ground off?

16 A. I don't know.

17 Q. Was the Leatherman mark on the handles ground off?

18 A. Yes.

19 Q. What happened to that prototype?

20 A. I don't know.

21 Q. Who did you give that prototype to?

22 A. J.J.

23 Q. When did Mr. Vlietstra ask for that prototype?

24 A. Dates . . . I can't remember. I don't know.

25 Q. Was Mr. Vlietstra the one who requested that

1 prototype?

2 A. Yes.

3 Q. Did he tell you why he wanted a prototype with all

4 of those Leatherman Tool components in it?

5 A. No.

6 Q. Did he tell you that he wanted a prototype with

7 Leatherman Tool components in it?

8 A. Yes.

9 Q. Which components did Mr. Vlietstra request to be

10 from a Leatherman Tool?

11 A. The one named before.

12 Q. So Mr. Vlietstra requested that the pliers be from

13 a Leatherman Tool?

14 A. The pliers, I'm not sure. I don't remember on the

15 pliers.

16 Q. Did Mr. Vlietstra request that the knife be from a

17 Leatherman Tool?

18 A. Yeah.

19 Q. Did Mr. Vlietstra request that the knife be from a

20 Leatherman Tool?

21 A. Yeah.

Q. Did Mr. Vlietstra request that all of the components be from a Leatherman Tool other than the fasteners?

A. Yeah.

Q. I want to talk for a little while about the mockup tool.

A. Okay.

Q. Do you recall receiving a mockup tool?

A. Yes, I do.

Q. How many did your receive?

A. One.

Q. When did you receive that?

A. I would say it was in late June '96.

Q. From whom did you receive it?

A. Pete Jones.

Q. What did you do with the mockup once you receive it?

A. I gave it to Dave Sendall.

Q. Did you inspect it before you sent it off?

A. No.

Q. Did you look at any of the details of the

23 tool before you sent it off?

24 A. No.

25 Q. The tool that you received, did it have any

3 A. I can't answer that question. I don't have

4 that knowledge.

5 Q. But it's your understanding that the marks

6 were removed because Cooper's tool didn't

7 have any marks there; is that correct?

8 A. When this photograph was taken, we were under

9 the same type of deadlines. This was a

10 photograph of the prototype --

11 Q. Correct.

12 A. – which I've already explained to you was --

13 my understanding, was exactly as our product

14 would look. And the marks would have been --

15 I would have instructed them to be removed.

16 Q. You instructed that the marks be removed?

17 That was your instruction?

18 A. Yes.

19 Q. Why did you give that instruction?

A. I was directed to give that instruction.

Q. Who directed you to give that instruction?

A. Pete Jones.

Q. Why did Mr. Jones – did Mr. Jones tell you why he was giving you that instruction?

A. No. Other than our product wouldn't have

William R. Bliss – Deposition Excerpt (74)

those marks.

Q. Did he say that?

A. I don't recall specifically, but if he said to remove those – that semi-circle, that's what I instructed the agency to do.

Q. But you're certain you received that instruction from Mr. Jones?

A. Yes. I would not do that on my own.

Q. Why not?

A. I wouldn't make a significant change like that unless I was told to do that.

Q. So removing the marks around the pivot joint was a significant change?

A. Yeah. That's a – in terms of advertising, in terms of what the product looks like --

Q. Yes.

A. – yeah.

Q. Did Mr. Jones tell you what, if any, marks would appear on the Cooper ToolZall in the actual finished product?

A. No, he didn't. Not to my knowledge.

Q. Have you ever seen a ToolZall, that was actually sold by Cooper, that had marks like this, an indentation with a "Crescent" and an

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No. 99-2035

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?

PARTIES TO THE PROCEEDING

Cooper Industries, Inc. is the only petitioner in this proceeding. Petitioner certifies pursuant to Supreme Court Rule 29.6 that it has no parent corporation nor are there any publicly held companies owning 10% or more of its stock.

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In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Ninth Circuit simultaneously issued two opinions—one published (Pet. App. 6a-17a),[1] and one unpublished (Pet. App. 1a-5a)—in resolving the case below. The published opinion is reported at 199 F.3d 1009. The district court's judgment (Pet. App. 19a-26a) and post-verdict Order denying Petitioner's motion for judgment as a matter of law (Pet. App. 27a-31a) are unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decisions on December 17, 1999. The court denied Petitioner's timely petition for rehearing/rehearing en banc on March 3, 2000. (Pet. App. 18a). After seeking and receiving from Justice O'Connor an

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[1] "Pet. App." refers to the Appendix in the Petition for a Writ of Certiorari.

extension of time in which to file a petition for a writ of certiorari, Petitioner timely filed its petition on June 20, 2000. This Court granted certiorari on October 10, 2000, and now has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Due Process Clause of the Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of . . . property, without due process of law." U.S. CONST. amend. V.

The Reexamination Clause of the Seventh Amendment provides: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

STATEMENT OF THE CASE

Both Petitioner Cooper Industries, Inc. ("Cooper") and Respondent Leatherman Tool Group, Inc. ("Leatherman") are tool manufacturers. In the early 1980s, Leatherman developed and began to market a multi-function hand tool denominated the Pocket Survival Tool ("PST"). Although Leatherman has sold millions of these item over the last two decades, it has never received a patent for the device.

In 1995, Cooper sought to develop a similar product in an attempt to compete with the PST in the hand tool market. (ER 1081-83; Tr. 865-68).[2] In this endeavor, Cooper, as it is legally entitled to do, (Pet. App. 16a), largely copied the basic functional design of the PST, albeit with several modifications, including the additions of a serrated knife, a locking mechanism, and removable fasteners. (ER 326-28).

[2] "Tr." refers to the trial transcript. "ER" refers to the Excerpt of Record in the Ninth Circuit.

Early in the development stage, Cooper constructed a mock-up of its new tool, which it ultimately named a "ToolZall," for initial layouts in advertisements. (Tr. 947-48). At that time—approximately June or July of 1996—the first of Cooper's new tools had not yet rolled off the production line. (ER 688; Tr. 948.) Cooper's brand manager on the ToolZall project thus instructed employees at the company's plant to put together a prototype for advertising purposes. (ER 688).

An engineer at Cooper's plant assembled the ToolZall prototype by modifying the substantially similar looking Leatherman PST. (ER 688-89). In particular, Cooper's unique fasteners were placed on a PST and all designating Leatherman marks were removed. (ER 337, 705). Testimony revealed, and the Ninth Circuit explicitly held, that the visual distinctions between the photographed ToolZall mock-up and the Leatherman PST are virtually imperceptible. (App. 3a).[3]

Cooper formally introduced its ToolZall product at the National Hardware Show in August 1996. (Tr. 886). At this event, Cooper used the mock-up photographs in its advertisements, press kits, packaging, and other disseminated materials. (ER 623-26). Cooper also employed the same photos in promotional materials sent to various magazines and mail-order catalogs. (ER 626).

While attending the 1996 hardware show, Leatherman co-founder and president Tim Leatherman carefully examined the ToolZall mock-up photographs posted in the Cooper booth and discerned a similarity between the pictured Cooper tool and the Leatherman PST. (Tr. 99-100). After the show, he saw the same photographs in magazine and catalog advertisements as well as on the ToolZall package itself. (Tr. 104).

[3] Juxtaposed photographs of the ToolZall prototype and PST are included on page seven of Cooper's opening brief in the Ninth Circuit.

In September 1996, Leatherman filed the instant action against Cooper in the United States District Court for the District of Oregon. The complaint included a Lanham Act trade dress infringement claim and common law causes of action for unfair competition, false advertising, and "passing off."[4] In addition to damages, Leatherman sought an injunction against (i) the manufacture and sale of the ToolZall, and (ii) any further use of the modified PST in ToolZall advertising. (Pet. App. 32a).

Upon service of Leatherman's suit, Cooper acknowledged its use of a modified PST in company advertisements and voluntarily withdrew its ToolZall from the domestic market in the middle of October 1996. (Tr. 733). It further sent written notice to its sales personnel on November 20, 1996, ordering the recall of all ToolZall promotional materials bearing photographs of the modified PST. (ER 1070). Cooper then entered into a "Stipulated Order for Preliminary Injunction with Respect to Advertising," which the district judge promptly signed on December 20, 1996. (J.A. 12-13). The Order enjoined Cooper from using any photograph of a Leatherman tool, modified or otherwise, in ToolZall advertising or packaging. (*Id.*).

Contemporaneous with its issuance of the advertising injunction, the court, concluding that Leatherman had demonstrated a likelihood of success on its trade dress infringement claim, entered a separate preliminary injunction barring Cooper from conducting any additional sales of its ToolZall product in the United States pending the outcome of the litigation.[5] (Pet. App. 44a). In combination, the October 1996 voluntary withdrawal and December 1996 preliminary injunction kept Cooper from selling a single original ToolZall in the United States after October 1996.[6] (Tr. 1061-62).

[4] The complaint also contained a copyright infringement claim. Prior to trial, the parties stipulated to an entry of judgment against Cooper on this cause of action after agreeing that Leatherman had suffered no damages in connection with the infringement. (J.A. 10-11). No evidence was presented to the jury on this cause of action nor did the jury consider any of the allegations related thereto in its deliberations. (*Id.*).

In 1997, despite both the advertising injunction and written directive to its sales personnel, it was brought to Cooper's attention that photographs of the modified PST were still appearing periodically in ToolZall ads in various catalogs and magazines. (Tr. 367-69). Upon being alerted to this situation, Cooper sent a letter on April 24, 1997, to all of its domestic resellers/distributors,[7] ordering that any outstanding promotional materials depicting a modified PST be returned to the company immediately. (Tr. 906-08). In practical terms, none of the recalled advertisements resulted in any revenue to Cooper (or harm to Leatherman) inasmuch as Cooper was under an injunction barring it from selling the ToolZall and, in fact, had removed the item from the market in October 1996. (Tr. 898).

Leatherman's lawsuit proceeded to trial in October 1997. Based on testimony from Leatherman's experts, the court instructed jurors that the damages, if any, flowing from Cooper's allegedly unlawful activities were roughly equivalent to Cooper's profits on the original ToolZall. (Tr. 701-

[5] The district court later issued a permanent injunction enjoining Cooper from selling its original ToolZall within the United States.

[6] Cooper introduced a new ToolZall in 1997 that was highly dissimilar to the PST. No advertisements using a modified PST appeared for the new ToolZall. (Tr. 1061-62). Although Leatherman amended its complaint to allege that the new ToolZall also infringed on its trade dress rights, that claim was flatly rejected by the jury. (J.A. 16). There has never been any serious suggestion that consumers viewing the new ToolZall would have confused the device for a PST.

[7] Cooper sells its products through resale distribution channels, rather than by direct sales to end-user consumers. (Tr. 936-37).

02; Instruction 36). According to Cooper's expert witness, Creighton Hoffman, whose testimony the jury apparently accepted, Cooper's gross profits from nationwide ToolZall sales approximated $50,000. (J.A. 24). No attempt was made by either Leatherman or its experts to segregate damages on the trade dress infringement claim from damages on the common law false advertising/"passing off" causes of action.

On October 17, 1997, the jury returned a verdict concluding that Cooper's original ToolZall infringed Leatherman's trade dress rights in the PST, but that Leatherman had suffered no damages from the infringement. (J.A. 15-16). The jury further determined that Cooper had engaged in common law unfair competition, passing off, and false advertising, causing Leatherman $50,000 in damages. (J.A. 17). The jury then imposed $4.5 million in punitive damages against Cooper on the common law claims after finding that Cooper's false advertising/passing off was malicious. (J.A. 18).

Cooper filed a timely post-trial motion in which it requested, amongst other relief, a reduction of the punitive damage award as a matter of law. Cooper argued, *inter alia*, that, because it suspended all sales of the original ToolZall after October 1996, its ads could not have had more than the most minimal impact on Leatherman's revenues. Cooper also emphasized that, since the visual distinctions between the genuine ToolZall and the modified PST appearing in the Cooper advertisements were virtually undetectable, the ads could not possibly have had *any* effect on Leatherman's reputation among consumers. Finally, Cooper maintained that a punitive damage award that was ninety times the amount of the purely economic compensatory damages purportedly suffered by Leatherman violated Cooper's due process rights, as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

In its abbreviated entry of judgment issued November 17, 1997, the district court denied Cooper's motion to reduce the punitive damage award. (Pet. App. 24a). Its perfunctory treatment of the *Gore* issue yielded no more than this single conclusory statement: "I find that the award is fairly proportional given both the nature of the conduct, evidence of intentional use of the modified [PST] and the size of an award necessary to deter future similar conduct given defendant's size and assets." (Pet. App. 24a). In a subsequent order denying Cooper's formal motion for judgment as a matter of law, the court also refused to reduce the punitive damages pursuant to Oregon law. (Pet. App. 29a-31a).

Cooper appealed. The Ninth Circuit, in a published opinion, reversed the district court verdict on the trade dress infringement claim and vacated the injunction. (Pet. App. 6a-17a). It held that the design of the unpatented PST was entirely "functional" and, therefore, not protectable trade dress. (Pet. App. 10a) ("[T]he physical details and design of a product may be protected under the trademark laws only if they are nonfunctional.").

At the same time, in a separate unpublished opinion, the Ninth Circuit affirmed the jury's verdict on liability and damages as to the common law claims. (Pet. App. 1a-5a). Although expressly acknowledging that Cooper's false advertising was highly "unusual" in that no consumers could have been deceived by the company's conduct, (Pet. App. 3a), the court below nonetheless held that Cooper's actions amounted to "literal passing off." (Pet. App. 3a-4a). This "literal passing off," in the circuit's view, may have given Cooper an unfair advantage by allowing it to obtain a mock-up photograph of its ToolZall more quickly than if it had started from scratch or waited until the genuine ToolZall had come off the production line. (Pet. App. 4a). Notwithstanding the district court's observation that Cooper's post-injunction ToolZall advertisements were at least "arguably inadvertent," (Pet. App. 31a), the Ninth Circuit added that Cooper's failure to remedy the problem after an injunction

had issued suggested "an indifference to legal consequences." (Pet. App. 4a).

With respect to the punitive damages due process issue, the Ninth Circuit, applying a deferential standard of review, held the district court did not abuse its discretion in refusing to reduce punitive damages. (Pet. App. 3a-4a). This petition for certiorari followed.

SUMMARY OF THE ARGUMENT

In *Gore*, this Court admonished that "grossly excessive" punitive damage awards run afoul of the Due Process Clause of the Constitution. The majority there identified several legal guideposts for ascertaining whether the constitutional "gross excessiveness" threshold has been crossed. Federal circuits have since divided, however, over whether, in reviewing a district court's gross excessiveness determination, the standard of review on appeal is *de novo* or "abuse of discretion."

All available jurisprudential indicia point to the former and away from the latter. Indeed, the Court has held definitively that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice, not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. No such "fair notice" emerges from a review standard that is both solicitous of, and deferential to, the trial judge's exercise of discretion.

It is not surprising that the *Gore* guideposts—*i.e.*, the misconduct's relative reprehensibility, the relationship between the jury's compensatory and punitive awards, and the comparison of analogous civil and criminal penalties—focus away from discretionary-grounded determinations. *Gore*, instead, calls for an inquiry that is essentially legal in nature (not fact-bound) and revolves around matters that the jury neither considered nor should have considered in its deliberations.

Traditionally, appellate courts have been regarded as best positioned to grapple with, and answer, such legal questions. *Salve Regina College v. Russell*, 499 U.S. 225, 231-32 (1991). Precisely because the issue to be decided calls for no separate fact finding, but involves only the application of *established* facts to governing legal principles, the deliberation process on appeal is plenary. *See United States v. First City Natl' Bank*, 386 U.S. 361, 368 (1967).

Here, of course, the measurement of whether a punitive damage award is grossly excessive is of *constitutional* importance. This Court has been resolute in its insistence that appellate court review of constitutional claims rooted in the Bill of Rights be undertaken *de novo*. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 515 (1963) (speaking of independent appellate review in the context of examining Due Process Clause claims as nothing less than a "duty of constitutional adjudication"). Independent appellate review has been adjudged essential in such circumstances "if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas v. United States*, 517 U.S. 690, 698 (1996).

Most constitutional issues -- due process attacks on the excessiveness of punitive damage awards in particular -- acquire context only through application. As the "expositor of law" on such questions, *Miller v. Fenton*, 474 U.S. 104, 114 (1985), appellate courts are able to clarify and give efficacy to the governing jurisprudence only by uniformly applying a meaningful standard of review to the full array of factual scenarios. By contrast, a review standard that unduly accords deference to the trial court's discretion "invites divergent development of [constitutional] law among the federal trial courts," *Salve Regina College*, 499 U.S. at 234, promising to foster significantly disparate constitutional boundaries in every jurisdiction.

Accordingly, constitutional excessiveness challenges to punitive damage awards must undergo independent, *de*

novo appellate review if the Due Process Clause is to function effectively as a bulwark against wholly arbitrary or irrational awards. Petitioner does not suggest, nor is it constitutionally required, that appellate courts must somehow divine the exact amount of punitive damages necessary to punish and deter a defendant's misconduct. But their dispassionate application of the constitutional standards governing punitive damages, accentuated by an acute awareness of similarly situated appellate courts' treatment of the issue, will, over time, develop a cogent body of law that promulgates an environment of predictability and reasonableness. In this way alone can the "fair notice" principle embodied in the Due Process Clause be meaningfully served.

Finally, requiring *de novo* review of the due process question at issue here poses no problem under the Reexamination Clause of the Seventh Amendment. The constitutional excessiveness probe undertaken by the court of appeals entails no reexamination of any jury fact findings. The circuit is, instead, determining whether the punitive damage award is excessive *as a matter of law* and, in so doing, is identifying that portion of the award (if any) that constitutes unlawful excess. The issue is purely legal and, therefore, does not intrude on any traditional function of the jury that might require a more deferential standard of review under the Reexamination Clause. *Cf. Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996) (dealing with appellate review of compensatory, not punitive, damages).

ARGUMENT

I. The Question of Constitutional Excessiveness of Punitive Damage Awards Must Be Accorded Independent Appellate Review

This Court has embraced a substantive due process limitation on "grossly excessive" punitive damage awards. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO*

Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) (plurality); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). As expressed in *Gore*, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. In recognition of the fact that punitive damages present an acute risk of arbitrary deprivation of property, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994), the Court's majority has identified several guideposts for assessing gross excessiveness. *Gore*, 517 U.S. at 575-84. Federal courts of appeals have divided, however, over the proper standard of review for evaluating district court determinations on this constitutional issue.

This case brings that division to the Supreme Court for resolution. As with appeals arising under virtually every other provision in the Constitution's Bill of Rights, so too here, a *de novo* review standard operates as the only effective safeguard against an award of constitutionally excessive punitive damages. The abuse of discretion standard employed by the Ninth Circuit below is wholly inadequate to the task. It calls upon appellate courts not to evaluate the *Gore* factors based on independent analysis and judgment, but to defer largely to trial judges who are, for the most part, less experienced and adept at handling the requisite legal questions. Such deferential review brings neither rationality nor predictability to the constitutional inquiry and, as is evident here, invites appellate courts to maintain only the most illusory sensitivity to the Supreme Court's due process jurisprudence in the punitive damages context.[8]

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[8] In the instant case, the Ninth Circuit's "review" of Petitioner's constitutional challenge to the punitive award was so expansively deferential to the district court's ruling that it effectively short-circuited any meaningful application of the *Gore* factors. Indeed, from all appearances, the only factor the court considered on the excessiveness issue was Petitioner's

(footnote continued on next page)

A. Meaningful Constraints On Punitive Damage Awards Need Discernible Parameters That Can Only Come With *De Novo* Appellate Review

Justice Kennedy observed in his *TXO Production Corp.* concurrence that the inquiry into gross excessiveness of a punitive damage award is meaningless without some fixed beacon to mark the boundaries of reasonableness. 509 U.S. at 466 ("To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what?"). The guideposts established in *Gore*—*i.e.*, the degree of reprehensibility of the defendant's misconduct, the relationship between the punitive award and the actual or potential harm suffered by the plaintiff, and the similarities and distinctions between the punitive award and comparable civil or criminal sanctions, 517 U.S. at 574-84—were designed to focus this constitutional analysis.

More to the point, adoption of these factors reflected an acknowledgement of the constitutional necessity for some objective indicia against which to discern the permissible scope of punitive damage awards. While eschewing any strict "test" or talismanic formula in *TXO Production Corp.*, 509 U.S. at 457-58, the Court there recognized that a defendant's right to notice as to the severity of the penalty to which he may be exposed cannot be predicated on constitutional limits entrusted solely to the discretion of individual decisionmakers. Inescapably, one person's "excess very well may be another's moderation." *Id.* at 481 (O'Connor, J., dissenting).

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wealth, the relevancy of which has heretofore been seriously questioned by this Court. *See Gore*, 517 U.S. at 591 (Breyer, J., concurring); *Haslip*, 499 U.S. at 22. Thus, the Ninth Circuit's constitutional evaluation cannot survive scrutiny under any standard of review.

The *Gore* guideposts are of little utility if their application is not subjected to rigorous appellate review. Without binding appellate precedent, neither jurors nor trial judges have a frame of meaningful reference for gauging the magnitude of a defendant's blameworthiness. Punitive damage awards tend to fluctuate erratically principally because, while moral judgments are widely shared, the "mapping [of those] judgments onto an unbounded scale of dollars" defies consistency. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2074 (1998). As empirical studies have demonstrated overwhelmingly, the natural consequence of this difficulty in translating abstract emotion into monetary figures is wildly unpredictable and arbitrary punitive awards.[9] *Id.* In short, similarly-situated defendants are not treated similarly.

As human beings, judges are equally susceptible to these cognitive biases. Judges, nonetheless, generally overcome the psychological impediments by working "within a discipline and hierarchical organization that . . . promotes roughly uniform interpretation and application of the law." *Gore*, 517 U.S. at 596 (Breyer, J., concurring). Yet, if trial judges' determinations of constitutional excessiveness are not channeled by some controlling parameters established by an appellate court, there is no "discipline" or "hierarchical organization" to effectuate the uniform application of law. There is simply the placement of a judicial imprimatur on the jury's capricious verdict, effectively sanctioning a conversion of rational outrage into an irrational award. *See* David Schkade et al., *Empirical Study: Deliberating About Dollars:*

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[9] The Brief Amicus Curiae of Certain Leading Business Corporations contains a more detailed discussion of these scientific studies.

The Severity Shift, 100 Colum. L. Rev. 1139, 1142-49 (2000).[10]

In this regard, it is critical that the *Gore* guideposts all involve determinations that are (i) essentially legal in nature and (ii) transcend anything the jury considered, or should have considered, in reaching its verdict.[11] The comparison, for example, between the punitive damage award and other civil or criminal sanctions calls for an assessment of the nexus between the punishment imposed by the jury and similar punishments available under law. Both the identification of analogous statutes and penalties and the interpretation of those applicable provisions are quintessential legal issues. Neither disputed nor historical facts are part of the analysis.

Similarly, the *Gore* focus on the ratio between the punitive and compensatory damage awards seeks to isolate a benchmark of constitutionality based on awards that have survived gross excessiveness scrutiny in other cases. While there is no precise mathematical formula, this component of the analysis probes whether the disparity between the punitive and actual damages is so substantial as to fall outside a

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[10] The absence of consistency also conceivably erodes the basic purposes of tort law, which are to compensate victims fairly for their injuries and losses, to allocate and spread the risk of the costs of those injuries, and to deter misconduct. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 4, at 20-26 (5th ed. 1984). Erratic and irrational verdicts, if sustained, nurture a socially divisive environment of overdeterrence and "excessive precautionary measures." A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 955 (1998). Notions of proportionality are progressively obscured.

[11] For a more detailed discussion of the unique roles played by juries and judges in the calculation and examination of punitive damage awards, *see* Part I.A. of the United States Chamber of Commerce's Brief Amicus Curiae.

"constitutionally acceptable range." *Gore*, 517 U.S. at 583. The comparative inquiry is predominantly legal in nature and relies almost entirely on matters outside the record for its resolution.

The same is true with respect to the final factor identified in *Gore*—*i.e.*, the degree of reprehensibility of the defendant's conduct. The court here is not assessing whether the defendant acted maliciously. That threshold finding was presumably made by the jury as a condition precedent to the award of *any* exemplary damages, *see* J.A. 14 (instruction on punitive damages), and it is not to be disturbed if there is sufficient evidence in the record to support it.[12] What the "reprehensibility" factor examines is the proper placement of the defendant's misconduct along a continuum of blameworthiness. *See id.* at 576-80 (describing relative degrees of reprehensibility for variety of bad acts).[13] The evaluation must look to prior precedent and compare the conduct and ap-

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[12] A defendant's appellate attack on the sufficiency of evidence as to malice would have to be raised in a challenge to the district judge's denial of a motion for new trial or judgment as a matter of law. This threshold sufficiency issue would not be part of the ultimate constitutional inquiry into gross excessiveness; it would implicate only issues of the controlling substantive law (usually state law in diversity cases) that define the parameters of malice.

[13] In *Gore*, for example, the Court outlined a variety of comparative factors pertinent to the fraud claim at issue there. For example, the Court noted that (1) purely economic torts are less pernicious than torts inflicting physical injury, (2) economic torts are more egregious when the target is financially vulnerable, (3) trickery and deceit are more onerous than negligence, (4) repeated conduct is more reprehensible than isolated instances of malfeasance, (5) conduct is more blameworthy if a defendant engaged in it while knowing or suspecting it was unlawful, (6) omission of material facts is less problematic than deliberate false statements, and (7) nondisclosures are less troublesome where a defendant had a good faith basis for believing that no duty to disclose existed. *Gore*, 517 U.S. at 576-80. A host of additional factors would have to be identified for other types of torts.

proved punitive damage awards therein with the defendant's conduct and punitive award in the case at bar.

Appellate judges are better positioned to assess these *Gore* guideposts than are their district court counterparts. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985) (selection of the proper standard of review often turns on determination of which judicial actor is best positioned to decide the issue in question). Trial judges' principal contribution is to evaluate demeanor and credibility in the factfinding process, concerns that play no role in the constitutional excessiveness calculus. That constitutional analysis calls for no separate findings of fact, but merely involves the application of *established* facts (viewed in a light most favorable to the plaintiff) to the applicable constitutional principles. It is the courts of appeals that have been regarded as most ideally suited to decide such legal issues.[14] *See Salve Regina College v. Russell*, 499 U.S. 225, 231-32 (1991).

B. Legal Issues Are Nearly Always Reviewed *De Novo* By Appellate Courts

Appellate courts customarily review legal questions under a *de novo* standard. *Id.* at 231-33. While a trial court's findings of fact are traditionally accorded deference, and thus are not set aside unless "clearly erroneous," Fed. R. Civ. P. 52(a) (civil cases); *Maine v. Taylor*, 477 U.S. 131, 145 (1986) (criminal cases), its legal conclusions, with only rare

[14] Petitioner does not suggest that trial judges are endowed with insufficient competence to resolve non-fact intensive constitutional issues. Indeed, district courts must take on such legal inquiries in the first instance and must do so with diligence. But, at least with respect to the constitutional gross excessiveness analysis at issue here, district judges have no institutional advantage that would justify any deference in an appellate court's review of their legal conclusions.

exceptions, are evaluated by the circuit in plenary fashion. *Salve Regina College*, 499 U.S. at 231-32. Under this *de novo* standard, courts of appeals must "make an independent determination of the [legal] issues" in controversy. *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967).

The determination whether a particular punitive damage award is so grossly excessive as to violate the Due Process Clause is best characterized as a mixed question of law and fact. *See Pullman-Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982) (defining mixed question as one in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether . . . the rule of law as applied to the established facts is or is not violated"). This Court typically has subjected such questions to the same degree of *de novo* review as pure legal matters in order that appellate courts may refine the governing precedent and expound upon the legal values at issue through an evolutionary process of case-by-case adjudication. *See Thompson v. Keohane*, 516 U.S. 99, 109-10 & 115-16 (1995); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 (1984).[15]

As this Court recognized in *Salve Regina College*, courts of appeals "are structurally suited to the collaborative juridicial process that promotes decisional accuracy." 499 U.S. at 232. The record having been fully developed below, appellate judges, sitting in panels that facilitate both reflective dialogue and collective judgment, are able to devote their full attention to legal issues. *Id.* This "[i]ndependent appellate review of legal issues best serves the dual goals of doc-

[15] Although this Court did not articulate any standard of review, its extraordinarily detailed examination of the established facts in *Gore*, *TXO Production Corp.*, and *Haslip* to determine if the punitive awards therein contravened the Due Process Clause suggests an implicit approval of a *de novo* standard. There is nary a hint in those decisions of deference to the district judge.

trinal coherence and economy of judicial administration." *Id.* at 231.

Importantly, the constitutional limits on excessive punitive damage awards can only be enforced adequately if the governing standards are clarified over time, ultimately creating a cogent body of law. *See Thompson*, 516 U.S. at 115-16; *Bose*, 466 U.S. at 502. The role of appellate courts in developing such a template is obviously critical because only appellate decisions carry binding precedential value. The jurisprudence emanating from their independent review will allow subsequent courts to distill greater meaning from the relatively abstract factors articulated in *Gore* and thereby promote a heightened degree of rationality and predictability in punitive awards.

To be sure, there is an inevitable degree of imprecision in calculating the maximum constitutionally permissible punitive damages in any particular case. It is exactly this difficulty in measuring gross excessiveness, however, that most highlights the need for a centralized application of constitutional principles to similarly situated defendants. Indeed, assuming there is independent appellate review, a rough scale eventually will emerge to give structure to the due process inquiry and thereby minimize the prospects for confusion and arbitrariness. *See Ornelas v. United States*, 517 U.S. 690, 698 (1996). The construction of this mosaic, tile by tile, is best calculated to inoculate defendants from entirely irrational punitive damage verdicts.

C. Constitutional Issues Demand Independent Appellate Review

Adoption of a *de novo* review standard in due process challenges to punitive damage awards adheres to this Court's longstanding policy of mandating independent appellate review on nearly all questions relating to the scope of fundamental constitutional rights. The Court, for example, has

spoken of independent review in the context of examining Due Process Clause claims as nothing less than a "duty of constitutional adjudication." *Haynes v. Washington*, 373 U.S. 503, 515 (1963). Similarly, in rejecting deference to trial courts on First Amendment challenges, the Court has stated that the constitutional nature of the precepts at stake render it imperative that their proper application be entrusted to appellate judges, the actors most competent to ensure the safeguarding of such rights. *Bose Corp.*, 466 U.S. at 502.

In this regard, *de novo* review is essential "if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697. Indeed, the exercise of this decisional authority is the very "process through which the rule itself evolves and its integrity is maintained." *Bose*, 466 U.S. at 503. Most constitutional issues—due process attacks on the excessiveness of punitive damage awards in particular—acquire content only through application. As the "expositor of law" in these situations, *Miller*, 474 U.S. at 114, appellate courts are able to shape the governing jurisprudence and mold its contours only by uniformly applying a meaningful standard of review to the full array of factual scenarios. *Ornelas*, 517 U.S. at 697-98. To be sure, factual distinctions in individual cases may well limit the precedential value of any particular decision; nevertheless, appellate court opinions, when viewed collectively, will complement each other and "add to the body of law on the subject." *Id.* at 698.

A virtually unbroken line of Supreme Court precedent illuminates this understanding. Just three Terms ago, in a case remarkably similar to the instant action, the Court addressed whether a criminal forfeiture imposed upon a defendant contravened the Excessive Fines Clause of the Eighth Amendment. *See United States v. Bajakajian*, 524 U.S. 321 (1998). The analysis it undertook there entailed a comparison of the amount of the forfeiture to the gravity of the defendant's offense, an inquiry guided by many of the same factors deemed critical in *Gore* to the gross excessiveness assessment of punitive damage awards. *Id.* at 336. Although

the Court conceded that the proportionality examination is "inherently imprecise," it explicitly rejected abuse of discretion review. *Id.* at 336-37 & n.10. The Court held that "the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate."[16] *Id.* at 336-37 n.10.

The Court employed the same reasoning in *Solem v. Helm*, 463 U.S. 277 (1983), in examining whether a criminal defendant's sentence was sufficiently excessive to violate the Eighth Amendment's Cruel and Unusual Punishment Clause. It held at the outset that a criminal sentence must be proportionate to the crime for which a defendant was convicted. *Id.* at 290. The Court then adopted several objective criteria to guide this proportionality determination: the gravity of the offense and the harshness of the penalty; the sentences imposed on other criminals in the same jurisdiction; and the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 292. In broaching the applicable standard of appellate review, the Court emphasized that trial judges ordinarily enjoy wide latitude in sentencing matters, and it is not the role of appellate tribunals to substitute their own judgment for that of the trial court. *Id.* at 290 & n.16. But there is a *constitutional* threshold on the severity of sentences, and, when that constitutional inquiry is in play, the Court implicitly admonished courts of appeals to determine

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[16] Although never explicitly addressing the standard of review in such cases, the Court's precedent on Excessive Fines Clause challenges to *civil* penalties also appears to treat the issue as one of law, subject to independent appellate review. *See St. Louis, Iron, Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 350-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78-79 (1907).

de novo whether the line has been crossed. *See id.* at 290-303 & n.16.

The Court's decision in *Ornelas*, *supra*, in which it adopted a standard of independent appellate review for determining the presence of reasonable suspicion and probable cause in Fourth Amendment challenges, supports a *de novo* standard here as well. The Court there began by noting that reasonable suspicion and probable cause are "fluid concepts" that derive substantive content only from the unique contexts in which they are assessed. *Ornelas*, 517 U.S. at 696. Although district court historical fact determinations may be entitled to some deference, *id.* at 699, the Court flatly rejected anything less than *de novo* review of a trial judge's ultimate constitutional holding. *Id.* at 697. In language no less fitting here, the Court concluded:

> A policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause. Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

Id. (citation omitted); *accord Ker v. California*, 374 U.S. 23, 34 (1963) ("While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of *constitutional* rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether . . . the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected.") (emphasis added).

These identical principles also guide the Court's habeas corpus jurisprudence. While it is firmly established in such cases—both through judicial precedent and subsequent

statutory codification—that state court factual findings are entitled to a presumption of correctness,[17] *Miller v. Fenton*, 474 U.S. 104, 111 (1985), this Court has consistently treated the mixed-fact-and-law *constitutional* issues arising therein as matters requiring *de novo* review at the federal appellate level.

In *Thompson*, *supra*, for example, the Court held that a state court's determination as to whether a suspect was "in custody" for purposes of *Miranda* presents a mixed fact/law question necessitating independent federal appellate review. The Court reasoned that the application of those facts to the governing legal standard is an area in which deference has no place. *Thompson*, 516 U.S. at 112-13. *De novo* review, the Court observed, more effectively guides law enforcement, unifies precedent, and stabilizes the law. *Id.* at 115. In furtherance of this point, the Court added that "case-by-case elaboration when a *constitutional* right is implicated may more accurately be described as law declaration than as law application," *id.* at 116 (emphasis added), thus falling squarely within an appellate court's primary responsibility of defining the parameters of the law.

The same reasoning provides the anchor for this Court's invocation of a plenary appellate review standard on ultimate constitutional questions in habeas cases involving the voluntariness of a defendant's confession, *Miller*, 474 U.S. at 115-17; the effectiveness of a defendant's counsel, *Strickland v. Washington*, 466 U.S. 668, 698 (1984); the voluntariness of a defendant's waiver of his right to counsel, *Brewer v. Williams*, 430 U.S. 387, 397 & n.4 (1977); a defendant's competency to stand trial, *Drope v. Missouri*, 420 U.S. 162, 174-75 & n.10 (1975); the presence of a conflict of

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[17] These cases pre-date the April 1996 adoption of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, which statutorily altered the applicable review standards in federal habeas actions.

interest flowing from an attorney's representation of multiple defendants, *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980); and the constitutional reliability of pre-trial identification procedures, *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam). These decisions recognize that only a *de novo* standard ensures the faithful protection of fundamental rights and safeguards the role of the judiciary in maintaining constitutional order.

The due process guarantee of freedom from arbitrary deprivations of property is no less important than the constitutional protections in the criminal arena discussed above. *De novo* appellate review, therefore, is similarly demanded here as a "duty of constitutional adjudication," *Haynes*, 373 U.S. at 515, to guard against punitive damage awards that, on a meaningful application of the *Gore* factors, exceed constitutionally acceptable limits.

D. A Deferential Review Standard on the Constitutional Excessiveness Question Renders the Due Process Limitation on Punitive Damage Awards Meaningless

To be sure, the Court has employed a deferential review standard in cases where the constitutional right at issue turns almost exclusively on a trial court's assessment of demeanor and credibility. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (voluntariness of defendant's consent to a warrantless search); *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986) (discriminatory intent in *voir dire* peremptory challenge); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (presence of racial animus in legislature's adoption of statutory provision); *Wainwright v. Witt*, 469 U.S. 412, 428 (1985) (juror bias). These rulings are entirely logical given that the ultimate determinations are peculiarly within the province of the trial judge.

Similar logic explains those several occasions in which this Court has commanded the circuits to apply a deferential standard of review to district court rulings on *non-constitutional* legal issues. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (imposition of Fed. R. Civ. P. 11 sanctions); *Pierce v. Underwood*, 487 U.S. 552 (1988) (assessment of whether government's litigating position was "substantially justified" for purposes of Equal Access to Justice Act attorney fee provision); *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830 (1996) (proximate and superseding causation issues in negligence claims). Unlike the instant action, appellate review in those instances dealt with matters that were either related to the supervision of trial litigation or rooted in factual determinations, areas in which district judges have special expertise by virtue of their proximity to the proceedings. *See Cooter & Gell*, 496 U.S. at 401-02; *Pierce*, 487 U.S. at 560; *Exxon Co.*, 517 U.S. at 840-41.[18]

If, however, the interpretation of important legal protections that are *not* inextricably intertwined with district court factual findings—especially *constitutional* safeguards like the substantive due process right identified by this Court in *Gore*—is to depend on the discretion of individual trial judges, the structure necessary to translate the Constitution's

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[18] Additionally, the legal issues in controversy in those cases were relatively insignificant and unlikely to yield much law-clarifying benefits from *de novo* appellate review. *See Cooter & Gell*, 496 U.S. at 403-05 (independent appellate review would be unproductive because circuit's decision on Rule 11 issue would divine nothing more than the state of the law at some point in the past; little or no precedential value would flow therefrom); *Pierce*, 487 U.S. at 561 (significant investment of appellate resources would be wasteful where resolution of legal issue would explain "not what the law now is, but what the Government was substantially justified in believing it to have been."). The Court did remark, however, that if the legal issue had involved "substantial liability" or "substantial consequences,"—as surely a constitutional gross excessiveness question does—a more "intensive" review would have been necessary. *Pierce*, 487 U.S. at 563.

vague principles into discernible rules of law would be all but lost. The delineation of our most sacred protections would be no more clear than Justice Stewart's "I know it when I see it" test for obscenity, *see Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), a formulation that has proven to be less than satisfactory. Indeed, one could even go so far as to say that such a standard would be more reflective of rule by man, rather than by law, a notion antithetical to our constitutional framework.

The bedrock principles which support that framework demand a far more solid jurisprudential foundation than the shifting sands of discretion provide. While the Constitution retains the same meaning in the hands of different trial judges, an abuse of discretion review standard "invites divergent development of [constitutional] law among the federal trial courts," *Salve Regina College*, 499 U.S. at 234, and thereby has the untoward effect of encouraging radically different constitutional boundaries in every jurisdiction. Such an inconsonant administration of our most basic rights should not be countenanced.

Nor is *Browning-Ferris Industries of Vermont, Inc. v. Kelco-Disposal, Inc.*, 492 U.S. 257 (1989) to the contrary. The issue there was the proper standard of appellate review for evaluating punitive damage excessiveness determinations rendered by district courts, *not as a matter of constitutional law, but only in the context of discretionary Rule 59 new trial motions*. *Id.* at 278-80. The Court's adoption of an abuse of discretion standard, *id.* at 279, recognizes that most Rule 59 inquiries allow the district judge to reweigh evidence, assess witness credibility, and grant a new trial (or remittitur) if the verdict appears *in his opinion* to be against the weight of the evidence. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216-18 (1947); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). The question presented on appeal in such circumstances is thus not whether the punitive award is excessive *as a matter of law*, but, on a full review of the

trial record, whether there is a basis for the district judge's *personal opinion* as to excessiveness.[19]

Yet, precisely because such a fact-laden determination is appropriately deferential to trial judge discretion, *Browning-Ferris Industries*, 492 U.S. at 279, it lacks the coherence needed to satisfy the notice requirement that the Due Process Clause compels. As *Gore* makes clear, even punitive damage awards that a trial judge might find inoffensive under the highly discretionary standards governing Rule 59 new trial motions, could well, on an independent review of the relevant *Gore* criteria, overstep the constitutional limits for excessiveness.[20]

In the final analysis, then, *constitutional* challenges to punitive damage awards on the ground of gross excessiveness must undergo independent appellate review if the Due Process Clause is to function effectively as a bulwark against

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[19] Rule 59 new trial motions are not always wholly discretionary. A defendant could challenge a punitive damage award in such a motion on the ground that it is excessive *as a matter of law* (pursuant to either the Constitution or the controlling substantive law). The trial judge's analysis of that non-discretionary legal limitation would have to be reviewed *de novo*. While these purely legal attacks on punitive awards could, as well, be brought under Rule 50, the procedural mechanism ultimately is irrelevant. The character of the claim is what is dispositive, and its legal character points toward *de novo* appellate review as to that discrete issue.

[20] For primarily the same reasons, the highly deferential "rational factfinder standard" proposed by *Amici curiae* Erwin Chemerinsky and Arthur McEvoy at the certiorari petition stage is also inappropriate. This proposal, modeled after the test governing evidentiary sufficiency challenges to criminal convictions, *see Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (habeas); *Glasser v. United States*, 315 U.S. 60, 80 (1942) (direct appeal), would ask whether any rational trier of fact could have arrived at the jury's punitive damage award in light of the record evidence. To the extent this test can be characterized as a standard of appellate review, it is no more than abuse of discretion cloaked in *de novo* garb and should be rejected for the reasons outlined above. *Cf. TXO Prod. Corp.*, 509 U.S. at 456 (repudiating rational basis standard).

wholly arbitrary or irrational awards. Indeed, the only refuge from such verdicts is the imposition of "significant[] constrain[ts]" on the determination whether the jury's award has transcended constitutional excessiveness. *Gore*, 517 U.S. at 595 (Breyer, J., concurring). Absent some statute establishing a quantitative limitation on punitive damages, a "detailed examination" of the award is critical to cabining the inflamed passions of individual juries and trial judges. *Id.* at 595-96. According district judges vast discretion as part of the appellate inquiry removes all prospects of consistency and "invite[s] extreme results that jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18.

Under a deferential review standard, the guideposts adopted in *Gore* that "purport to channel discretion" will "not do so in fact." *Gore*, 517 U.S. at 595 (Breyer, J., concurring). Rather, the deference will invite, if not encourage, the judicial nullification of these supposedly constraining forces by embracing the type of deficient scrutiny employed by the Ninth Circuit here. The Constitution requires much more.

Petitioner does not suggest that appellate judges can somehow consult their oracle of knowledge and isolate the exact punitive award necessary to punish and deter a defendant's misconduct. But their dispassionate application of the constitutional standards governing punitive damages, accentuated by an acute awareness of similarly situated appellate courts' treatment of the issue, will, over time, develop a cogent body of law that fosters an environment of predictability and reasonableness. And as Justice Breyer has noted, it is "the uniform general treatment of similarly situated persons that is the essence of law itself." *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

II. Independent Appellate Review of a District Court's Constitutional Excessiveness Determination Is Not Inconsistent with the Reexamination Clause of the Seventh Amendment

It must be emphasized here that independent appellate review of a defendant's constitutional challenge to the gross excessiveness of a punitive damage award is not constricted by the Seventh Amendment's Reexamination Clause. As Justice Holmes observed in *Southern Railway v. Bennett*, 233 U.S. 80, 87 (1914), if a jury's award of damages appears excessive as a "matter of law," the Court is free to review that award without running afoul of the Constitution.[21] In such an analysis, the Court is not reexamining any fact determined by a jury. It is "merely identif[ying] that portion of the judgment that constitutes 'unlawful excess.'" *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 443 (1996) (Stevens, J., dissenting) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

This Court's decision in *Gasperini* is not to the contrary. There *compensatory*—not *punitive*—damages were at issue. While holding that, in such circumstances, the Seventh Amendment not only permits appellate review of a district judge's denial of a motion to set aside a jury verdict as excessive, but that such scrutiny is "necessary and proper to the fair administration of justice," *id.* at 435, the Court commanded that a deferential abuse of discretion standard is to be applied. *Id.* at 435-36. Because review of the actual damage award entails some reexamination (albeit an acceptable degree) of jury fact findings, requiring appellate courts to accord some deference to the district judge—whose presence in

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[21] This principle is true regardless of whether the court is examining the award for legal excessiveness under state law or the federal Constitution. *See supra* note 19.

the courtroom offers a personal perspective not otherwise available to the circuit—broke no new ground. *See id.* at 438-39.

In contrast, punitive damages present no questions of historical or predictive fact. *Id.* at 459 (Scalia, J., dissenting). The level of such an award is thus not a "'fact' 'tried' by the jury." *Id.* Punitive damages are merely "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).[22] As one lower court noted, a punitive damage award is "not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct." *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996).

Whether the amount awarded is so excessive as to be constitutionally unacceptable is primarily a legal question, the answer to which cannot be found in the folds of discretion. Rather, it must be determined by the court of appeals based on the legal criteria this Court outlined in *Gore*. Only *de novo* review fulfills that purpose and thus ensures that the constitutional standard will be meaningfully applied in all cases on a uniform basis.

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[22] Indeed, as Justice Scalia noted in his *Gasperini* dissent, in none of the Court's (now-abrogated) "cases holding that the Reexamination Clause prevents federal appellate review of claims of excessive damages does it appear that the damages had a truly 'punitive' component." 518 U.S. at 459. In this regard, *see, e.g.*, *St. Louis, Iron, Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915); *Texas & Pac. Ry. Co. v. Hill*, 237 U.S. 208, 215 (1915); *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914); *Herencia v. Guzman*, 219 U.S. 44, 45 (1911); *Lincoln v. Power*, 151 U.S. 436, 437-38 (1894); *Railroad Co. v. Fraloff*, 100 U.S. 24, 31-32 (1879).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and the case remanded for the purpose of requiring the court of appeals to evaluate Petitioner's constitutional challenge to the punitive damage award under the proper standard of review.

Respectfully submitted,

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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This case presents the question of the standard by which a federal appeals court should review a district court's ruling on a challenge to the constitutionality of a punitive damages award. In *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), this Court held that "abuse of discretion" is the proper standard of appellate review of punitive awards in federal court. In *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 434 (1996), this Court held that a federal appeals court should not determine for itself whether a damages award "materially deviates from what is reasonable compensation" but rather should apply only abuse of discretion review. These decisions reflect the fact that tradition, practical concerns, and the Seventh Amendment all militate against any form of de novo or independent review by appellate courts.

Moreover, the record of this case demonstrates that the judgment below should be affirmed under *any* standard of review. The deliberate wrongdoing and multi-million-dollar expected gain in this case amply justify the $4.5 million in punitive damages upheld by the district court.

1. Background. Both petitioner Cooper Industries, Inc. ("Cooper") and respondent Leatherman Tool Group, Inc. ("Leatherman") are tool manufacturers. In the fall of 1995, Cooper decided to manufacture and sell a multipurpose tool in competition with Leatherman's well-known Pocket Survival Tool ("Leatherman Tool"). Cooper intended to take 5% of Leatherman's market. "Our take [at] 5% of the Leatherman market should [be] in the $3M range." J.A. 21. Other evidence showed that Cooper anticipated profit margins in excess of 30% and gross profits of approximately $3 million during the first five years of sales. Plaintiff's Trial Exhibit ("Ex.") 72.

Rather than design a tool of its own, Cooper decided to copy the successful Leatherman Tool. Cooper employees were

instructed to purchase a Leatherman Tool because Cooper's would be "the same size, etc." Ex. 96. The Cooper development team even referred internally to its product as the "Cooperman" tool, reflecting its copying of the Leatherman Tool. Pet. App. 44a.

Cooper planned to launch its "ToolZall" at the National Hardware Show ("Hardware Show") in Chicago in August 1996. Ct. App. Excerpts of Record ("ER") 968. The Hardware Show is the most important trade show of the year and is attended by 70,000-90,000 people, including retailers intent on placing orders for new products. Tr. 333, 497, 886. Cooper's plan was to introduce the new ToolZall with considerable fanfare as one of its major new products for the year, using large posters, color brochures, flyers, and media kits. ER 624-26. Cooper scheduled over two dozen advertisements in national print publications from June through November 1996. ER 753; Ex. 66.

Cooper began developing marketing materials in the spring of 1996. With no actual ToolZalls available to create the marketing materials, Cooper constructed a "mock-up" tool by grinding the Leatherman trademark from the handles and pliers head of a Leatherman Tool and replacing the fasteners. J.A. 57-64. Although Cooper has contended that Peter Jones, the Cooper Brand Manager overseeing the project, was unaware that the mock-up was a modified Leatherman Tool, Cooper is wrong. In his deposition, Mr. Jones reluctantly acknowledged that he knew that the mock-up "may include some components from other multifunction tools," including Leatherman's. J.A. 52-56. Mr. Jones forwarded the mock-up to Bill Bliss, Cooper's liaison to its advertising agency, to give to the agency. ER J.A. 65-66. The agency returned the mock-up to Mr. Jones. J.A. 22. Although the Leatherman trademark had been ground off the tool, a curved indentation remained on the pliers head where the trademark had appeared. J.A. 19. To remove this curved mark from a photograph of the mock-up tool, Cooper's ad agency retouched the photograph at the direction of Mr. Jones. J.A. 67-69; Exs. 21-26.

Cooper used the photograph of the barely modified Leatherman Tool (the "Leatherman photograph") in all of its packaging and initial marketing materials, including brochures, catalog pages, press kits, posters and print advertisements. ER 753-56. These marketing materials were prominently displayed and widely distributed at the Hardware Show. ER 622-26. The marketing materials were given to Cooper's sales force for distribution to thousands of vendors who sell to the public and to mail-order catalogs. ER 623-26, 632.

Cooper's use of the Leatherman photograph caused confusion. At the Hardware Show, both Cooper and Leatherman were asked whether Leatherman manufactured the ToolZall for Cooper. ER 719; Tr. 98. Others were confused by Cooper's use of the Leatherman photograph, at and after the show. ER 731-41. Thus, retailers may have placed orders for the ToolZall, believing it was manufactured by Leatherman.

Cooper also used other depictions of the Leatherman Tool to portray its ToolZall. In order to show Cooper's international sales representatives a picture of the ToolZall, Mr. Jones copied a line-art drawing of the Leatherman Tool. He then "whited out" the Leatherman trademark from the drawing, transferred the modified drawing to a computer disk and e-mailed it to foreign representatives as a drawing of the ToolZall. J.A. 43-47; ER 640; Tr. 970.[1]

In September 1996, one month after the Hardware Show, Leatherman filed suit against Cooper alleging trade dress infringement, passing off, and false advertising. While Cooper promptly acknowledged that its marketing materials and packaging displayed a photograph of a modified Leatherman Tool, no immediate action was taken. Cooper waited a full two months, until November 20, 1996, before recalling the misleading marketing materials from its sales personnel. J.A. 23,

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[1] On October 6, 1997, Cooper stipulated to judgment on the copyright infringement claim arising from these acts.

32-36. However, Cooper made an affirmative decision *not* to recall the misleading materials from thousands of vendors, numerous mail-order catalogs, and other recipients. *Id.* Cooper's memorandum to its sales personnel instructed them, in bold type, not to retrieve the marketing materials from Cooper's customers. J.A. 23; ER 905-06.

On December 18, 1996, the district court entered an injunction prohibiting sale of the ToolZall, and on December 20, 1996, Cooper stipulated to an injunction against use of the packaging and marketing materials displaying the Leatherman photograph. J.A. 20. Cooper's decision not to recall the marketing materials resulted in thousands of violations when vendors and mail-order catalogs used the Leatherman photograph to advertise the ToolZall. J.A. 32-41. Following entry of the preliminary injunction, the misleading Leatherman photograph appeared in at least four national publications and in an ad in *The Oregonian* as late as August 1997. ER 1061-69.

At trial in October 1997, Tim Miller, Vice President for Sales and Marketing for Cooper's Hand Tools Division, testified that in March and April 1997 (several months after the preliminary injunction), Cooper's customers printed and distributed thousands of fliers showing the Leatherman photograph. J.A. 36-41. Mr. Miller also testified that there was no way of knowing how many advertisements using the misleading Leatherman photograph were still in circulation. J.A. 38, 40-41. Finally, Mr. Miller confirmed that Cooper made no initial efforts to gather these marketing materials, and did so after many months only because Leatherman insisted. J.A. 33-35.

Refusing to recall the misleading marketing materials was not the only act of culpable indifference by Cooper. In February 1997, two months after the preliminary injunction was entered, Cooper again used the Leatherman photograph, this time to create marketing materials and packaging for foreign markets. J.A. 40. When Leatherman promptly complained, Cooper waited until May 31, 1997, to recall the materials. ER 637-38. Mr. Miller admitted at trial that he did not know how many fliers or

advertisements were distributed throughout the world showing the modified Leatherman Tool. J.A. 40-41.

2. The District Court's Decision.

The jury awarded Leatherman $50,000 in compensatory damages on its common-law passing off and false advertising claims. J.A. 17. The award was relatively small no doubt because Leatherman brought suit immediately, forcing Cooper to suspend sales. Leatherman secured a preliminary injunction just four months after the introduction of the ToolZall.

With respect to punitive damages, the jury was instructed – without objection from Cooper[2] – that "Leatherman has the burden of proving by clear and convincing evidence that Cooper acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights." J.A. 14. "In establishing the amount, if any, of punitive damages to award you should consider the following factors:

1. The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims;
2. The defendant's motive;
3. The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and
4. The defendant's income and assets." J.A. 14.

The jury answered a special interrogatory finding that "Cooper acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights." J.A. 18. The jury awarded $4.5 million in punitive damages. *Id.* Pursuant to Oregon law, 60% of this award was

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[2] Cooper objected to an earlier draft instruction and requested that the jury be charged that Leatherman was not entitled to punitive damages on the trade dress claim. The district court amended the instruction as requested by Cooper. Cooper did not object to the final instruction as given.

allocated to the Criminal Injuries Compensation Account of the State of Oregon. Pet. App. 26a.

The excessiveness issue was extensively briefed before the district court on post-trial review under *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). Cooper submitted no fewer than six post-trial briefs addressing the punitive award. In response, Leatherman demonstrated that the award was entirely reasonable under each of the three guideposts set out in *BMW*. With respect to reprehensibility, Leatherman submitted an extensive catalogue of the record evidence demonstrating that every detail of the ToolZall project was approved by the highest levels of management; that Cooper's use of the photos and drawings of the Leatherman Tool in *all* of Cooper's initial marketing materials showed Cooper's intent and dispelled any notion of accidental use; that Cooper unreasonably delayed before recalling the offending promotional materials from its sales force and affirmatively decided not to recall the materials from vendors, mail order catalogs, and other recipients; that in February 1997, two months *after* the preliminary injunction was in place, Cooper made new advertising flyers for foreign markets, and once against used the improper photograph of the modified Leatherman Tool; that these flyers were circulated extensively in Europe until being recalled on May 31, 1997; and that, as a result of Cooper's dilatory tactics, long after the injunction was entered, U.S. vendors continued to sell Cooper's products using promotional materials depicting the modified Leatherman Tool. Leatherman's Response Brief Regarding Judgment, Equitable Relief, and Punitive Damages, in No. CV-96-1346-MA, at 15-21 (D. Or.) (filed Oct. 31, 1997).

Next, Leatherman showed that the punitive award was reasonably related to actual and potential damages under *BMW*. "Leatherman's actual damages were quite small, despite Cooper's intentional and admitted false advertising." *Id.* at 21. "Cooper failed to realize its projected profits because Leatherman acted promptly to obtain a preliminary injunction. Without an award of punitive damages, Cooper will not suffer at

all." *Id.* at 27. "Under these circumstances, a higher ratio of compensatory damages to punitives is justified." *Id.* at 21. Leatherman argued that this Court's decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), was highly instructive, because it focused on the potential effects had the illicit scheme succeeded. *Id.* at 46 (plurality opinion). "In this case, one measure of the potential harm is the amount Cooper anticipated in sales and profits from the original ToolZall. Cooper realized from the outset the millions of dollars at stake." Leatherman Br. at 23. "Cooper anticipated profit margins in excess of 30% and gross profits of approximately $3 million during the first five years of sales." *Id.* "The award of $4.5 million is thus certainly within an acceptable range compared to the potential harm Leatherman would have suffered had Cooper succeeded in its wrongful conduct." *Id.*

In addition, Leatherman showed that the punitive award was reasonable in comparison with the civil or criminal penalties that could be imposed for similar misconduct. Oregon statutes provide that anyone found to have willfully engaged in an unlawful trade practice, or to have violated an injunction under the state unfair trade practices act, is subject to a $25,000 penalty *per violation* in a suit brought by the state. *Id.* at 25. "Cooper willfully distributed thousands of depictions of a Leatherman Tool to pass off its ToolZall." *Id.* In addition, "it is clear that there were hundreds if not thousands of violations" of the injunction. *Id.* at 26. "The jury's punitive damages award was thus not out of line with the statutory civil penalties under the UTPA." *Id.*

In the face of this extensive record evidence and briefing by both parties, the district court (Marsh, D.J.) denied Cooper's objection to the punitive award, finding that "the award is fairly proportional given both the nature of the conduct, evidence of intentional use of the modified [Leatherman Tool] and the size of an award necessary to deter future similar conduct given defendant's size and assets." Pet. App. 24a. The district court also rejected Cooper's argument that its remedial steps – taken

only post-verdict, *after* the jury's award – justified a reduction in the damages. The district court explained that "defendant's post-judgment remedial efforts come too late to justify a reduction." *Id.* at 30a.

> Despite the entry of an agreed preliminary injunction relative to defendant's advertising materials depicting the [Leatherman Tool] mock-up, defendant failed to take steps to actually retrieve the materials from vendors and advertisers even though it admitted that its conduct was wrong. Thus, arguably inadvertent violations of the injunctions did in fact take place. It wasn't until the entry of the judgment that defendant was prompted to take the significant steps that it now has implemented to ensure that its actions are not repeated. To allow a reduction in this instance would defeat the purpose of deterrence and would unjustifiably award a defendant who the jury found deserved to be punished for its conduct.

Pet. App. 30a-31a.

3. The Ninth Circuit Appeal.

On appeal, Cooper focused primarily on issues *other* than punitive damages, such as its public domain defense and Leatherman's trade dress and attorney's fees claims. The federal excessiveness claim consumed no more than the final 4½ pages of Cooper's 63-page opening brief. In its reply, Cooper devoted a single page to the claim at the end of its 32-page brief. Cooper did not litigate the issue of the appropriate standard of appellate review for excessiveness claims. At oral argument, Cooper did not mention *BMW* or its federal excessiveness claim.

Despite the cursory nature of Cooper's excessiveness claim, the Ninth Circuit (Fogel, D.J., sitting by designation), gave it full consideration. The court of appeals opined:

> The district court specifically found that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size and assets. *Those findings were supported by the evidence*, such that the award did not violate Cooper's due process rights.

Pet. App. 3a (emphasis added). The Ninth Circuit added that "the jury's finding that Cooper engaged in passing off is supported by *substantial evidence* and is not challenged on appeal." *Id.* (emphasis added). The court remarked that "this is a very unusual passing off case" because any superior qualities of the Leatherman Tool were not perceptible in the photographs. *Id.* "We do not, however, intend to condone the conduct. It was literal passing off and at a minimum, it gave Cooper an unfair advantage by allowing it to use the sweat of Leatherman's efforts to obtain a 'mock-up' more cheaply, easily, and quickly than if it had started from scratch or waited until samples of its own product were ready." *Id.* at 4a. "Additionally, there was evidence that Cooper did not act promptly to remedy the problem even after an injunction issued, which suggests an indifference to legal consequences." *Id.* "Accordingly, the district court did not abuse its discretion in declining to reduce the amount of punitive damages." *Id.*

Thus, although it applied an abuse of discretion label, the Ninth Circuit in fact examined the record and determined that the district court's judgment was supported by "substantial evidence."

SUMMARY OF ARGUMENT

A federal court of appeals should use an abuse of discretion standard in reviewing a district court order denying a motion for new trial or remittitur on the ground that a punitive damage award is unconstitutionally excessive.

I. Historical practice raises grave questions about whether it

is permissible for appellate courts to engage in any review whatsoever of a trial court's denial of an excessiveness challenge to a damages verdict. At common law, there was simply no appellate review for excessiveness of damages. In *Gasperini*, this Court resolved this difficult issue by holding that, so long as the standard of review is confined to "abuse of discretion," appellate review of a district court's judgment regarding excessive damages is reconcilable with the Seventh Amendment. 518 U.S. at 434. But this Court held that a federal appeals court should not determine for itself whether a damages award "materially deviates from what is reasonable compensation." *Id.* Only four years later, petitioner now urges this Court to expand the role of appellate courts by broadening the standard to one of "de novo" or "independent" review. There is no historical basis for such an expansion. The proper level of punitive damages necessary for punishment and deterrence has always been seen as a "fact tried by a jury" for purposes of the Seventh Amendment, just as the proper level of damages necessary to compensate the plaintiff is a question for the jury. This Court's decision in *BMW* v. *Gore* reinforces rather than alters this principle.

II. Even apart from tradition and Seventh Amendment concerns, there is no reason to depart from abuse of discretion review. Application of the *BMW* guideposts is an intensely factual, case-specific exercise that is poorly suited to de novo appellate review, particularly when the resources of the federal courts of appeals are already overtaxed. Abuse of discretion review, which encompasses review for legal error, fully vindicates any role those courts need play as expositors of federal law.

There are also powerful practical reasons for an abuse of discretion standard. Excessiveness challenges ordinarily arise in the context of Rule 59 motions, where they are combined with other grounds for new trial, such as evidentiary questions, improper summations, and jury instructions. From a pragmatic standpoint, it makes sense for an appellate court to review the

district court's order under a single, abuse of discretion standard.

III. If this Court were to adopt a standard of de novo appellate review, the Court should make clear that such a standard in this context should amount, in practical effect, to the same thing as abuse of discretion review. The relevant question, even under a de novo standard, ought to remain: Is the district court's judgment denying the excessiveness challenge rational, drawing all reasonable factual inferences in its favor?

IV. Under any standard of appellate review, the district court's judgment sustaining the punitive damages award in this case should be affirmed. Indeed, the Ninth Circuit has already reviewed the evidence in the record and has concluded that the district court's decision to uphold this punitive award was "*supported by the evidence.*" Pet. App. 3a (emphasis added). The district court's judgment below should thus be affirmed under even de novo appellate review.

ARGUMENT

I. ABUSE OF DISCRETION IS THE PROPER STANDARD OF APPELLATE REVIEW OF A TRIAL JUDGE'S RULING ON AN EXCESSIVENESS CHALLENGE TO A PUNITIVE DAMAGES AWARD.

A. Historical Practice and Seventh Amendment Concerns Limit Appellate Review to Abuse of Discretion.

In recent years, this Court has repeatedly addressed the issue of judicial review of punitive damages awards and has consistently rejected any form of independent or de novo scrutiny by federal appellate courts. In *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court opined that "abuse of discretion" was the proper standard of appellate review in federal court. See *id.* at 279 ("The court of appeals should then review the district court's determination

under an abuse-of-discretion standard."). "In performing the limited function of a federal appellate court, we perceive no federal common-law standard, or compelling federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial." *Id.* at 279-80. In fact, after holding that the Second Circuit properly determined that the district court did not abuse its discretion in denying a motion for new trial or remittitur on the issue of punitive damages, this Court noted that it would reserve the question whether even a deferential standard such as abuse of discretion review might transgress the Seventh Amendment. *Id.* at 279 n.25 ("We have never held expressly that the Seventh Amendment allows appellate review of a district court's denial to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case. In light of the result we reach today, we follow the same course here."). This Court cautioned that "federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *Id.* at 280 n.26.

In *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), this Court upheld a punitive damages award against a constitutional excessiveness claim, explaining that this Court "more than once has approved the common-law method for assessing punitive awards." 499 U.S. at 15. "[E]very state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." *Id.* at 18. That common-law method, of course, included highly deferential appellate review of the quantum of damages awarded by juries, including punitive damages.

In *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court again upheld a punitive damages

award against a constitutional excessiveness challenge. A plurality of this Court expressly rejected the argument that punitive damages verdicts trigger "heightened scrutiny." *Id.* at 456. Assuming that fair procedures were followed, a judgment that is a product of the common-law method for imposing damages, this Court suggested, "is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so." *Id.* at 457.

Subsequently, in *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996), this Court held that a federal appeals court should *not* apply a state-law standard of review prescribed by New York to force closer judicial scrutiny of compensatory damages awards. Instead, this Court opined that the New York law should be applied by federal district courts, and that abuse of discretion was the proper standard of appellate review in federal court. This Court addressed the Seventh Amendment constraint on the power of federal courts to set aside jury verdicts as excessive, explaining that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. Such review was once deemed inconsonant with the Seventh Amendment's Reexamination Clause." *Id.* at 434. Ultimately, this Court held – over the dissent of Justice Scalia, joined by the Chief Justice and Justice Thomas – that "appellate review for *abuse of discretion* is reconcilable with the Seventh Amendment," and that "'[w]e must give the benefit of every doubt to the judgment of the trial judge.'" *Id.* (emphasis added and citation omitted). The dissenters would have held that not even abuse of discretion review by an appeals court is permissible under the Seventh Amendment's Re-Examination Clause.

1. The Historical Practice Recognized by this Court.

This Court's repeated unwillingness to approve any form of

appellate review beyond abuse of discretion is well-founded. For 150 years, this Court had held that, under the Seventh Amendment, no appellate review at all of excessiveness challenges was *permissible* – let alone *required*. See 11 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2819, at 204 (2d ed. 1995); Charles Alan Wright, LAW OF THE FEDERAL COURTS § 95, at 682 (5th ed. 1994).

In *Railroad Co.* v. *Fraloff*, 100 U.S. 24 (1879), for example, this Court addressed the question whether alleged excessiveness of a verdict was reviewable on appeal where there was no issue of faulty instructions or other trial error. Justice Harlan explained that appellate review was unavailable:

> Whether [the trial court's] action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.

Id. at 31-32. Subsequently, this Court repeatedly reaffirmed the rule that "motions for a new trial based on the ground that the damages allowed by the verdict are excessive" present "purely a question of fact" and that such motions are submitted to the legal discretion of the trial court, which cannot be reviewed. *Metropolitan R. Co.* v. *Moore*, 121 U.S. 558, 574 (1887); see also *St. Louis, I.M. & S.R. Co.* v. *Craft*, 237 U.S. 648, 661 (1915) (proper measure of damages "involves only a question of fact" which is not subject to appellate review). Thus, writing for the Court in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933), Justice Brandeis was able to declare that "[t]he rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by *a long and unbroken line of decisions*; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were

inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals." *Id.* at 481 (emphasis added).[3]

2. English Common Law.

The basis for these holdings was the limited nature of common-law appellate review. At common law, the three English courts of record having original jurisdiction – the King's Bench, the Exchequer, and the Court of Common Pleas – all sat at Westminster, but trials were rarely held there. Because of the inconvenience of having jurors and witnesses travel to

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[3] See also *Dimick* v. *Schiedt*, 293 U.S. 474, 489 (1935) (Stone, J., dissenting) (referring to the rule "of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review"); *Texas & Pac. R. Co.* v. *Hill*, 237 U.S. 208, 215 (1915) ("the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open" to review); *Southern Ry. — Carolina Div.* v. *Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.) ("[A] case of mere excess * * * does not present a question for re-examination here upon a writ of error."); *Herencia* v. *Guzman*, 219 U.S. 44, 45 (1910) ("[T]he objection that the verdict was against the weight of evidence, or that the damages allowed were excessive, cannot be considered."); *Lincoln* v. *Power*, 151 U.S. 436, 437 (1894) (rejecting excessiveness challenge because "it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury"); *Wilson* v. *Everett*, 139 U.S. 616, 621 (1891) (rejecting excessiveness claim because "this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury"); *New York, L. E. & W. R. Co.* v. *Winter's Adm'r*, 143 U.S. 60, 75 (1892) ("Whether the verdict was excessive is not our province to determine on this writ of error."); *Wabash Ry. Co.* v. *McDaniels*, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted."); 4 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 1332, at 2682 (9th ed. 1913) (in federal appeals courts, "the question of excessive damages is not considered, being left entirely to the trial court").

Westminster, under the *nisi prius* system judges from all courts would ride circuit and conduct trials in the local counties.[4] The *nisi prius* trial was limited to issues of fact going to liability and damages; the jury verdicts, along with any exceptions to the instructions or rulings of the *nisi prius* judge, were then returned to the en banc court at Westminster, where they were entered.[5]

At common law, an appeal and a motion for a new trial "were mutually exclusive remedies." *Fairmount*, 287 U.S. at 482 n.9 (citations omitted). An appeal took the form of a "writ of error," which removed the case to a different and higher court and was confined to matters of law.[6] Historically, the writ of error searched only the record of process, pleadings, verdict, and judgment for legal error.[7]

A request for a new trial on excessiveness and other such grounds was made prior to further proceedings and entry of judgment and was "addressed to the discretion of the court in banc" at Westminster. *Fairmount*, 287 U.S. at 482 n.9. The decision was final and subject to no further review as to factual

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[4] W.R. Cornish & G. de N. Clark, LAW AND SOCIETY IN ENGLAND 1750-1950, at 23 (1989); G.R.Y. Radcliffe & Geoffrey Cross, THE ENGLISH LEGAL SYSTEM 90, 183-84 (3d ed. 1954). Most cases were tried in the litigants' county, rather than at Westminster. A.K.R. Kiralfy, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 56 (5th ed. 1958).

[5] See generally 1 W.S. Holdsworth, A HISTORY OF ENGLISH COMMON LAW 223-24, 278-82 (2d ed. 1922); Radcliffe & Cross, *supra*, at 90-91, 183-186.

[6] J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 157 (3d ed. 1990); Radcliffe & Cross, *supra*, at 211; Cooley's BLACKSTONE 407, 411 (4th Am. ed. 1899).

[7] Note, *Appealability of Rulings on Motion for New Trial in the Federal Courts*, 98 U. PA. L. REV. 575, 575 (1950); *see also* 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 405 (1768) ("The writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it."); *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (Story, J.).

matters.[8]

Consideration of the motion for new trial was not a form of appellate review. See Baker, *supra*, at 159 (The power to grant new trial was "exercised before judgment, and not by a court of appeal. Once the court in banc had given judgment, the only redress was of the limited kind provided by writ of error.").

"[N]o English court ever set aside * * * a verdict, except with the concurrence of the judge, or judges, who sat with the jury, saw the witnesses, and heard them testify."[9] Thus, "the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified and, even then, only if he could persuade his brethren at Westminster to this view." Wright & Miller, *supra*, § 2819, at 204.[10]

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[8] Radcliffe & Cross, *supra*, at 211-12 ("one could not appeal against a refusal of the court *in banc* to grant a new trial"); Cooley's BLACKSTONE, *supra*, at 38-45, 57, 58, 391-92.

[9] Maxfield Weisbrod, *Limitations on Trial By Jury In Illinois*, 19 CHI. KENT L. REV. 91, 92 (1940). "An exhaustive examination of the early English cases has revealed not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence and he was dissatisfied with the verdict." *Id.*; see also 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 387 (1768) (new trial would be granted "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith").

[10] See also John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 213 (1988) (explaining that the King's Bench held that a "new trial would not be granted unless the *nisi prius* judge certified *in writing* that the verdict was against evidence") (emphasis in original). Moreover, the en banc court often refused to acquiesce in the trial judge's recommendation. Baker, *supra*, at 101. The court would not "order a new trial simply because it did not agree with the verdict. If there was no misdirection [of the jury] and there was some evidence on which the verdict could be supported, then it must stand." Radcliffe & Cross, *supra*, at 187. Hence, as late as 1764 the Court of Common Pleas was able to say that "there is not one single case (that is law)

3. The Seventh Amendment.

At common law there was no appellate review at all of excessiveness of damages and other factual issues. It would be remarkable, therefore, to hold today that de novo or independent review is somehow legally required. The historical record is also significant because of the command of the Seventh Amendment: "[I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (emphasis added). Justice Story described the italicized Re-Examination Clause as "more important" than the preceding portion of the Amendment. *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Clause "not only preserves th[e jury trial] right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935); see also *Colgrove* v. *Battin*, 413 U.S. 149, 155 n.6 (1973). The Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or it itself such prerogative." *Walker* v. *New Mexico R.R. Co.*, 165 U.S. 593, 596 (1897).

The Seventh Amendment was adopted principally to protect jury verdicts from after-the-fact judicial interference, especially by appellate courts. Hon. Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 50 (1977). "[T]he entire issue of the absence

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in all the law books to be found, where the Court has granted a new trial for excessive damages in cases of torts." *Beardmore* v. *Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764); see also *Duberly* v. *Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792) ("the Court [has] never granted a new trial in such a case as this for excessive damages").

of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases." Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 657 (1973).

The Re-Examination Clause was inserted into the Seventh Amendment specifically to address the "problem of appellate review of questions of fact." *Id.* at 727; see also *The Justices* v. *Murray*, 76 U.S. (9 Wall.) 274, 281 (1870) (Seventh Amendment adopted to allay "the apprehension and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury"). In *Parsons*, Justice Story held that a trial court did not err in refusing to transcribe testimony, which the petitioner sought "in order to establish the error of the verdict in matters of fact." 28 U.S. at 445. Justice Story explained that the application was immaterial because the Re-Examination Clause prohibited appellate review of such factual questions. *Id.* at 446-48.

Although this Court has indicated in *Gasperini* that abuse of discretion review by an appellate court is consistent with the Seventh Amendment, the Court should go no further. Expansion of appellate review to a standard of de novo or independent review would represent the very kind of review that this Court held in *Gasperini* should *not* be performed by federal appellate courts. Moreover, such expansion would be utterly inconsistent with traditional judicial practice and would raise very serious questions under the Seventh Amendment.

B. These Limitations Are Fully Applicable to Punitive Damages.

Petitioner seeks to distinguish *Gasperini* and the historical tradition of narrow appellate review by attempting to draw a sharp distinction between compensatory and punitive damages. But the proper amount of punitive damages – the amount necessary for punishment and deterrence – has always been seen as a "fact tried by a jury" for purposes of the Seventh

Amendment, just as the proper amount of damages necessary to compensate the plaintiff is a question for the jury.

This Court explained some 150 years ago that, "where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff * * * something farther by way of punishment or example, which has sometimes been called 'smart money.' *This has always been left to the discretion of the jury.*" *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (emphasis added). In *Missouri Pacific Railroad Co.* v. *Humes*, 115 U.S. 512 (1885), this Court held that assessment of punitive damages is committed to "[t]he discretion of the jury" and "the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *Id.* at 521. In *Barry* v. *Edmunds*, 116 U.S. 550 (1886), this Court opined that, in cases of exemplary damages, "it is the peculiar function of the jury to determine the amount by their verdict," and any other approach would "encroach[] upon the province of the jury." *Id.* at 565.[11]

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[11] See also G. Field, LAW OF DAMAGES 65 (1876) ("[T]he amount of damages by way of punishment or example are necessarily largely within the discretion of the jury; the only check * * * being the power of the court to set aside the verdict where it is manifest that the jury were unduly influenced by passion, prejudice, partiality, or corruption, or where it clearly evinces a mistake of the law or of the facts in the case."); *id.* at 73-74 ("'It is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in tort, and which all mankind must at first blush think so, to induce a court to grant a new trial for excessive damages.'") (citation omitted); C.T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 85, at 296 (1935) ("It is usually held that the amount of exemplary damages lies within the discretion of the jury, subject to review by the court only in cases of such abuse as indicates the influence of passion or prejudice."); Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES 521-22 (4th ed. 1868) ("[T]he jury may, if they think proper, give vindictive damages. * * * [W]here circumstances of aggravation are made apparent, where the motive of the defendant is grossly fraudulent, malicious, or oppressive, the amount of relief is left largely to the discretion of the jury."); *id.* at 545 ("where circumstances of aggravation are proved, the jury are the necessary as well as the rightful judges of the amount of relief"); 1 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 388, at 755 (9th ed. 1913) ("The amount of exemplary damages is generally said to be entirely within the discretion of the jury."); 4 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 1318, at 2659 (9th ed. 1913) ("the allowance and amount of exemplary damages is a question for the jury"); 1 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES 742 (1883) ("Whether [exemplary damages] shall be allowed, and their amount, are left to the discretion of the jury."); 3 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES 661 (1883) ("The amount of damages in these cases, both compensatory and exemplary, are in the discretion of the jury; and being so, the verdict must be palpably and grossly excessive to induce the court to set it aside."); 2 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES § 459, at 1493 (4th ed. 1916) ("It is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury."); *Sheik* v. *Hobson*, 64 Iowa 146, 148 (1884) ("the question whether punitory damages shall be assessed, and the amount of their assessment, is left to the discretion of the jury"); *Respass* v. *Parmer*, 2 A.K. Marsh. 365, 365 (Ky. 1820) ("In torts the jury are the exclusive judges of the damages."); *New Orleans, J. & Great N.R. Co.* v. *Hurst*, 36 Miss. 660, 666 (1859) (exemplary damages are committed to the jury's "discretion," and "[i]t is not enough that, in the opinion of the court, the damages are too high"); *McWilliams* v. *Bragg*, 3 Wis. 424, 427 (1854) ("the jury were the proper judges of the damages").

In *Haslip*, 499 U.S. at 15-17, this Court reaffirmed *Day*, *Humes*, and *Barry*. In *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), this Court again recognized the "primacy of the jury in the awarding of damages," *id.* at 353, including exemplary or punitive damages.[12]

Gasperini itself rejected the distinction petitioner proposes between compensatory and punitive damages. There, this Court relied extensively on *Browning-Ferris*, while noting that "*Browning-Ferris* concerned punitive damages." 518 U.S. at 435 n.18. "'[T]he question whether an award of compensatory

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[12] *Tull* v. *United States*, 481 U.S. 412, 425-26 & n.9 (1987) (cited at PLAC Br. 25 n.10, RR Br. 11), is not to the contrary. *Tull* involved a civil penalty action under the Clean Water Act, not a common-law claim for punitive damages. Moreover, *Tull* was severely limited, and indeed called into question, by *Feltner*. See 523 U.S. at 354-55 & n.9.

damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages exceeds what is permitted by law.'" *Id.* (citation omitted).

In addition, at least some of the cases establishing the longstanding Seventh Amendment prohibition against *any* appellate review of a trial court's denial of an excessiveness challenge (see note 3, *supra*) included an apparent exemplary or punitive component. *E.g.*, *New York, L. E. & W. R. Co.* v. *Winter's Adm'r*, 143 U.S. 60 (1892) ($10,000 for railroad passenger arbitrarily put off train in mid-journey).

These cases reflect the fact that petitioner's proposed distinction between compensatory and punitive damages is not simply hard to maintain in practice; it is flawed at the core. At common law, there was no relevant distinction between the judicial treatment of punitive damages and the treatment of other kinds of damages in torts cases. See, *e.g.*, 1 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 388, at 756 (9th ed. 1913) ("The power of the court to set aside a verdict for exemplary damages is the same power, and is exercised upon the same principle, as in any case of excessive verdict."). In fact, the very genesis of punitive damages rebuts petitioner's argument: punitive damages emerged as a substitute species of damages in cases where society's interest in deterrence and retribution were not fulfilled by the compensatory damages available to the plaintiff. See *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) (Punitive damages "came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. Punitive damages filled this gap.").

For example, in *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763), the victim of an illegal search requested a supplement to his damages on the ground "that trifling damages would put no stop at all to such proceedings," *id.* at 490, and received £1,000 after Lord Chief Justice Pratt explained to the jurors that they "have it within their power to give damages for more than the injury received. Damages are designed not only as a satisfaction

to the injured person, but likewise as a punishment to the guilty, to deter any from proceeding in the future, and as a proof of the detestation of the jury to the action itself." *Id.* at 498-99 (emphasis added). "In England, where exemplary damages had their origin, it is still not entirely clear whether the accepted theory is that they are a distinct and strictly punitive element of the recovery, or they are merely a swollen or 'aggravated' allowance of compensatory damages permitted in cases of outrage." C.T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 78, at 278 (1935).[13]

In the United States, punitive damages followed the same evolutionary path as in England. One of the first courts to entertain a punitive damages case instructed the jury "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offences in the future." *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 77 (1791); see also *Edwards* v. *Beach*, 3 Day 447, 450 (Conn. 1809) (amount of injury to property "is not the only ground of damages"; were it so, "a person so disposed might forcibly dispossess another of article of property at his pleasure, and compel the owner * * * to accept of the value in its stead"). In

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[13] In *Huckle* v. *Money*, 95 Eng. Rep. 768 (C.P. 1763), the court approved an award of damages of £300 to a journeyman printer falsely imprisoned for six hours by an official who "used him very civilly by treating him with beefsteaks and beer, so that he suffered very little or no damages." *Id.* at 768. In *Sears* v. *Lyons*, 171 Eng. Rep. 658 (K.B. 1818), the court instructed the jury that it was not limited to "the mere pecuniary damage sustained by the plaintiff" when the defendant acted with malice in destroying his property. *Id.* at 658; see also *Hewlett* v. *Cruchley*, 128 Eng. Rep. 696, 697 (K.B. 1813) (£2,000 verdict for malicious prosecution where out-of-pocket costs were £100); *Bruce* v. *Rawlins*, 95 Eng. Rep. 934, 934 (C.P. 1770) (£100 for illegal search that "did little or no damage"); *Benson* v. *Frederick*, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (£150 for whipping, even though the plaintiff was "not hurt much indeed"); *Tullidge* v. *Wade*, 95 Eng. Rep. 909, 909 (C.P. 1769) (although plaintiff's loss was no more than 20 shillings, verdict of £50 upheld, and "[i]f the jury had given £100 damages, [the judge] should not have thought them too much").

fact, many states continue to follow the rule that punitive damages may be awarded expressly to provide additional compensation to the plaintiff.[14]

Hence, the proper amount of punitive damages must be considered a "fact tried by a jury" under the Seventh Amendment.

C. *BMW* v. *Gore* Supports Deferential Appellate Review.

1. *BMW* Embraced Common-Law Precedent.

This Court's decision in *BMW* v. *Gore* confirms the appropriateness of deferential appellate review. *BMW* embraced rather than rejected common-law precedent regarding punitive damages. This Court distilled three "guideposts" (517 U.S. at 574) from common-law cases; it did not legislate them from whole cloth. Significantly, the same common-law tradition also established an extremely limited standard as the proper test for appellate review. As petitioner's own amicus states, *BMW* "never intimated that these guideposts were unique to a due process inquiry; to the contrary, it suggested that they were the traditional indicia of the reasonableness of an award." RR Br. 12.

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[14] See C.T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 78, at 279 (1935) (some states "approximate the English view" and regard punitive damages "not as punishment but as extra compensation for injured feelings or sense of outrage"); Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1085 (1989); *Continental Cas. Co.* v. *Fibreboard Corp.*, 762 F. Supp. 1368, 1376 (N.D. Cal. 1991); *Tedesco* v. *Maryland Cas. Co.*, 18 A.2d 357, 358 (Conn. 1941); *Bourgeois* v. *State Farm Mut. Auto. Ins. Co.*, 562 So. 2d 1177, 1179 (La. Ct. App. 1990); *Creech* v. *Aetna Cas. & Sur. Co.*, 516 So. 2d 1168, 1173 (La. Ct. App. 1987), *writ denied*, 519 So. 2d 128 (1988); *Kewin* v. *Massachusetts Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980); *Transportation Ins. Co.* v. *Moriel*, 814 S.W.2d 144, 150 (Tex. Civ. App.– El Paso 1991); *Hofer* v. *Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984).

In order to establish the significance of the reprehensibility guidepost, for example, the *BMW* Court relied on *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1852), and *St. Louis, I.M. & S.R. Co.* v. *Williams*, 251 U.S. 63, 66-67 (1919). See *BMW*, 517 U.S. at 575. Next, this Court observed that "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree," citing several nineteenth-century decisions,[15] as well as 65 enactments in common-law England during the period between 1275 and 1753 providing for double, treble, or quadruple damages to establish a ratio factor. *Id.* at 580-81; see also *TXO*, 509 U.S. at 459 ("state courts have long held that 'exemplary damages allowed should bear some proportion to the real damage sustained'") (citations omitted); *id.* at 476-78 & nn.1-2 (O'Connor, J., dissenting) (describing common-law restrictions on damages awards).

BMW v. *Gore* rejected any suggestion that the constitutional standard of excessiveness was a newly minted, bright-line test divorced from prior common-law approaches to assessing punitive damages awards: "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula." 517 U.S. at 582. We "reiterate our rejection of a categorical approach. Once again, we return to what we said * * * in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness * * * properly enter[s] into the constitutional calculus.'" *Id.* at 582-83 (quoting 499 U.S. at 458). This Court emphasized the latitude that States have in

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[15] 517 U.S. at 580 n.32 (citing *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852); *Saunders* v. *Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (1885); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D.C. 111, 125 (1885); *Houston & Tex. Cent. R. Co.* v. *Nichols*, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex. 1882); *McCarthy* v. *Niskern*, 22 Minn. 90, 91-92 (1875)).

imposing punitive damages. "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests [in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 517 U.S. at 568. And this Court cautioned that the excessiveness factors are only guidelines: "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* at 582; see also *id.* at 585 ("we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award").

The principal opinion in this Court's decision in *TXO* – authored by the same Justice who delivered the opinion for the Court in *BMW* v. *Gore* – illustrates that the test for constitutional excessiveness cannot be applied in mechanical fashion. In *TXO*, this Court expressly rejected a proposed test of certain "objective" criteria for punitive damage awards.[16] Instead, this Court in *TXO* upheld a punitive award that was 526 times the compensatory damages: "both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." 509 U.S. at 460. This Court examined the traditional function of punitive damages to punish and deter and considered evidence suggesting that the potential loss to the plaintiffs amounted to several million dollars, thus justifying a punitive award of $10 million.

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[16] See 509 U.S. at 457 ("Nor are we persuaded that reliance on petitioner's 'objective' criteria is the proper course to follow. • • • We question, however, the utility of such a comparative approach as a test for assessing whether a particular punitive award is presumptively unconstitutional."); *id.* at 458 ("we are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards").

Hence, *TXO* demonstrates that the constitutional standard of excessiveness must be understood in the context of the common-law tradition surrounding punitive damages.

Further, the *TXO* plurality made clear the limited nature of the due process right involved: "we do not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award." *Id.* at 458 n.24. Rather, this Court opined that the due process right involved was nothing new: "our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award." *Id.*

Indeed, the same arguments as petitioner makes for de novo appellate review could have been made before *BMW*. Even under common-law standards of excessiveness, judicial review of a motion for new trial or remittitur required the trial court to determine an upper threshold of damages beyond which any damages would be considered as a matter of law to be excessive, or "monstrous," or "shocking" to the conscience. Nonetheless, a trial court's judgment deciding whether the verdict exceeded the upper limit of permissible damages was never thought to authorize appellate review – let alone de novo, independent appellate review – of the trial court's decision.

The point is also confirmed by *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), where this Court addressed a provision of the Oregon Constitution stating that "*no fact tried by a jury* shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict." *Id.* at 427 n.5 (emphasis added). This Court took the provision to mean that, "if the defendant's only basis for relief is the *amount* of punitive damages the jury awarded, Oregon provides no procedure for reducing or setting aside that award." *Id.* at 426-27. The Court accordingly held Oregon law inconsistent with due process insofar as it barred all federal constitutional claims that particular punitive damages verdicts were excessive. Quite plainly, unless this Court deemed the

proper size of a punitive damages award to be a "fact tried by a jury," in the context of a federal constitutional claim that the damages were excessive, the challenged provision of the Oregon Constitution would not have been triggered, and this Court would have had to affirm the judgment in *Honda Motor Co.* v. *Oberg*.

As shown by *Oberg*, the constitutional standard of excessiveness is a continuation, rather than a repudiation, of common-law punitive damages excessiveness analysis – a tradition that also included extremely limited appellate review.

2. Constitutional Excessiveness Review Involves Facts Found By the Jury.

Petitioner contends that the *BMW* guideposts "transcend anything the jury considered, or should have considered, in reaching its verdict." Pet. Br. 14. That is not so. This Court has long urged that juries be given detailed instructions to confine their discretion as to punitive damages and that the governing standards not be reserved solely for post-verdict review. *E.g.*, *Haslip*, 499 U.S. at 52 (O'Connor, J., dissenting). Accordingly, the *BMW* guideposts themselves are often incorporated within jury instructions.[17] But even if they are not, post-verdict review

[17] Some lower courts have noted the Seventh Amendment Re-Examination issues raised in federal court by a reassessment of the jury's award according to legal standards that the jury was not given an opportunity to consider. *E.g.*, *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991); *Geressy* v. *Digital Equip. Corp.*, 950 F. Supp. 519, 521 (E.D.N.Y. 1997) ("If the jury is to accomplish its task under the Seventh Amendment, it is entitled to be informed of its role."). "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO*, 509 U.S. at 469 (Kennedy, J., concurring). At common law, a jury was entitled to consider all "the facts and circumstances connected with the wrong, showing the degree of malice and the results of the wrong," G. Field, LAW OF DAMAGES 102 (1876), and the verdict was not subsequently re-examined by courts according to factors the jury had not been allowed to consider. In this case, although the jury was not

under the *BMW* guideposts does not eliminate the essentially fact-dependent nature of the punitive damages inquiry. Determining whether a particular award is a reasonable form of punishment or deterrence requires that one first determine the nature of the wrongdoing and its degree of reprehensibility; the extent of the harm or potential harm threatened by the defendant's misconduct; and a host of other intensely factual matters. All of this requires reviewing the facts of the case. Whether a post-verdict review also entails application of a legal standard with which the jury has not been instructed, what is necessarily *also* required is review of an intensely factual question.

The *BMW* guideposts are inexorably tied up within the jury's verdict. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. This factor is likely to be at the heart of the jury's verdict: whether the defendant knew or suspected that its conduct was unlawful or instead had a good-faith belief that it was acting legally; whether the defendant made deliberately false statements; and whether the defendant "has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." *Id.* at 576-77 (noting that "repeated misconduct is more reprehensible than an individual instance of malfeasance").

Similarly, determining whether the punitive damages awarded bear a reasonable relationship to compensatory damages entails a highly factual inquiry, involving matters resolved by the jury. As this Court recognized in *BMW*, this factor will often require an analysis of "actual harm as determined by the jury." 517 U.S. at 582. In other cases, a court will have to pore over the facts of a case to assess whether "a particularly egregious act has resulted in only a small amount of economic damages" or whether "the

instructed on the *BMW* guideposts *in haec verba*, Cooper neither objected to the jury instructions nor appealed the issue.

injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* The defendant's expected gain and the plaintiff's potential loss are intensely factual issues, as illustrated by *TXO*, 509 U.S. at 462, which involved close scrutiny of the record evidence before the jury to resolve the disputed value of an expected stream of future natural gas royalties.

Even the application of the third guidepost – sanctions for comparable misconduct – will depend largely on the particular facts of a given case as found by the jury. In practice, the focus of the parties' disagreement will not be a *legal* dispute over how a statutory penalty or criminal provision should be interpreted in the abstract, but a *factual* dispute over whether the defendant's conduct is "similar" to the "malfeasance" punished by the legislative sanction. *BMW*, 517 U.S. at 584. For example, in *BMW* this Court noted that "some statutes draw a distinction between first offenders and recidivists." *Id.* Plainly, the parties are less likely to dispute the meaning of such statutes than they are the factual question of whether the defendant qualifies as a "recidivist."

Hence, constitutional excessiveness review involves matters placed before, and resolved by, the jury. As Justice Kennedy has observed in the context of excessiveness challenges, "the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *Haslip*, 499 U.S. at 41-42 (opinion concurring in judgment) (internal citation omitted).

3. *BMW* Itself Invoived Deferential Review.

Petitioner also contends that support for its standard of de novo appellate review is provided by the manner in which this Court reviewed the punitive award in *BMW*. To the contrary: this Court in *BMW* applied a deferential standard of review

regarding disputed issues of fact. This Court indicated that it would "assume, as the juries in this case and in the *Yates* case found, that the undisclosed damage to the new BMWs affected their actual value." 517 U.S. at 585. This Court deferred to the jury's finding "[n]otwithstanding the evidence adduced by BMW." *Id.*; see also *id.* at 579-80 ("We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State."). The phrase "de novo" never appears in the *BMW* opinion, and this Court never suggested that it was undertaking an "independent" review of the record.

Moreover, *BMW* v. *Gore* arose in state court, as did *Haslip* and *TXO*, where the restrictions of the Seventh Amendment do not apply. *E.g.*, *Walker* v. *Sauvinet*, 92 U.S. 90, 92 (1876). Hence, there was no Seventh Amendment constraint on the ability of the state appellate courts in *BMW*, *TXO*, and *Haslip* to review the punitive damages awards. Federal courts, by contrast, are bound by the restrictions of the Seventh Amendment, including its Re-Examination Clause. This Court has recently held, in the context of an excessiveness challenge to a damages award, that the Seventh Amendment precludes a federal appellate court from ordering a remittitur, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered," without affording the plaintiff the option of a new trial. *Hetzel* v. *Prince William County*, 523 U.S. 208, 211 (1998) (per curiam) (internal citation omitted).

Hence, tradition plainly marks abuse of discretion review as the maximum standard a federal appellate court should apply. Nothing about the nature of judicial review in state-court cases such as *Haslip*, *TXO*, or *BMW* justifies de novo or independent appellate review of punitive damage awards in cases governed by the Seventh Amendment.

II. THERE IS NO REASON TO DEPART FROM THE ABUSE OF DISCRETION STANDARD.

Petitioner shoulders a heavy burden in urging this Court to depart from the historic tradition of narrow appellate review of excessiveness questions. This Court has held that "a long history of appellate practice" or "a historical tradition" may establish the proper standard of review. *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). That is the case here.

Further, application of the *BMW* guideposts is an intensely fact-dependent exercise that is ill-suited to de novo appellate review, particularly when the resources of the federal courts of appeals are already overtaxed. Moreover, any role for those courts as expositors of uniform federal law is fully accommodated by abuse of discretion review, which encompasses review for legal error. Hence, even if this Court were to focus solely on institutional concerns – whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question," *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985) – those factors militate in favor of at most abuse of discretion review.

Petitioner's standard of de novo review is thinly disguised tort reform from the bench – a characterization underscored by the array of amici supporting petitioner – and is designed to give a defendant an unfair advantage in the form of two bites at the apple. First, at the trial court level, a disgruntled litigant can request the trial judge to set aside the verdict as excessive, or alternatively, grant a new trial. Second, under petitioner's view, the losing defendant would be able to appeal the decision, even in the absence of any error of law by the trial judge, and seek a de novo review of the jury verdict and the district court's decision by an appellate court. There is no basis in law for such an unfairly skewed procedure – a procedure whose logic would encompass as many repetitions of de novo review as the system, for its own institutional reasons, happens to provide layers of appeal.

A. District Courts Are Better Situated Than Appellate Courts to Review Punitive Awards.

Even in the criminal context, where the right to liberty rather than mere money damages is at stake, this Court has held that abuse of discretion is the proper standard for fact-intensive determinations by district courts. In *Koon* v. *United States*, 518 U.S. 81 (1996), this Court held that a district court decision to depart from the Guideline sentencing range should be reviewed on appeal for abuse of discretion rather than de novo. Even though the Guidelines prescribe detailed factors to constrain a district court's discretion and are aimed at producing uniformity among sentencing decisions by different courts, this Court held that the Guideline's purpose of reducing "unjustified disparities in sentencing" did not justify de novo review. *Id.* at 96. "[T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.* at 98. This Court noted a "district court's special competence – about the 'ordinariness' or 'unusualness' of a particular case," and the need to recognize "the reactions of the trial judge to the fact-specific circumstances of the case." *Id.* (citation omitted). This Court rejected the argument – identical to that advanced by petitioner here – that questions of appropriate punishment can best be resolved in the rarified atmosphere of an appellate court, abstracted from the factual details of the case with which the district court is most familiar:

> The Government seeks to avoid the factual nature of the departure inquiry by describing it at a higher level of generality linked closely to questions of law. * * * [But] it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases. What the district court must determine is whether the misconduct that occurred in the particular instance suffices to make the case atypical. The

> answer is apt to vary depending on, for instance, the severity of the misconduct, its timing, and the disruption it causes. These considerations are factual matters.

518 U.S. at 99-100.

This reasoning is squarely applicable here.

1. The *BMW* Guideposts Are Fact-Intensive.

The constitutional excessiveness inquiry under the *BMW* guideposts is a highly fact-intensive, context-specific process. Because a court "cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," *Haslip*, 499 U.S. at 18, the excessiveness inquiry involves a determination whether the award falls within a range of possible acceptable awards. There is rarely any single "right" answer as to the proper quantum of punitive damages. The question is therefore whether the judgment entered by the trial court falls within the zone of reasonableness. See *BMW*, 517 U.S. at 568 (whether award falls within "the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment"). The excessiveness inquiry, like other issues suited for deferential review, has "furry edges." Ronald Dworkin, TAKING RIGHTS SERIOUSLY 22 (1977). By its nature, such a question lends itself to an abuse of discretion rather than a de novo standard. Given the superior vantage point of the district court regarding the factual context of the case, there is no warrant for de novo appellate review.

As a plurality of this Court explained in *TXO*, punitive damages awards "are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." 509 U.S. at 457. In *Haslip*, this Court noted that punitive awards "must depend on the peculiar

circumstances of each case." 499 U.S. at 16 (internal quotation omitted).

This case illustrates that the *BMW* guideposts are highly fact-specific, and their proper application demands close familiarity with the factual record of a case. Here, the defendant's intent and (alleged) good faith was central to the reprehensibility issue. The trial judge, having seen and heard the witnesses testify and be cross-examined, is obviously better able to discern the defendant's state of mind, evaluate demeanor and credibility, and resolve the factual disputes upon which application of the *BMW* guideposts depends.

Cooper argues that the excessiveness test entails nothing more than a mechanical application of undisputed or otherwise established facts to the governing constitutional principles. But this argument ignores the reality that reprehensibility, expected gain, potential harm, and other relevant variables turn on nuanced issues of fact, which are typically vigorously disputed. An appellate court would have no special insight into these factors on a cold record. Again, this very case illustrates the point. Before this Court, petitioner and its amici attempt to relitigate the jury's verdict and the trial judge's decision. See Pet. Br. 5 (arguing that Cooper acted "[u]pon being alerted to the situation"); Chamber Commerce Br. 3 (Cooper's conduct warranted punishment "by only the barest of margins"). Petitioner's own strategy before this Court shows that the application of the *BMW* guideposts cannot realistically be reduced to an antiseptic or mechanical exercise performed by appellate judges with no first-hand familiarity with the facts of the case.

2. Appellate Courts Have No Special Expertise that Would Warrant De Novo Review.

While in some circumstances the courts of appeals play the principal role in ensuring the uniform application of legal rules to particular sets of facts, see, *e.g.*, *Ornelas* v. *United States*, 517

U.S. 690, 697-98 (1996) (defining probable cause and reasonable suspicion), the application of the *BMW* guideposts is not such a situation. "District courts have an institutional advantage over appellate courts" in applying these guideposts, because they see many more civil tort cases than appellate courts do. *Koon*, 518 U.S. at 98. An appellate panel has no first-hand experience with torts trials, or even criminal trials, and its information will be limited to prior reported decisions.

Contrary to petitioner's claim (Pet. Br. 16), a court of appeals is not in a better position to conduct comparative excessiveness review or to determine how a particular case ranks among other punitive damages cases. What is most relevant to comparative review is an in-depth understanding of the factual nuances of the individual case, which a district court enjoys by virtue of its first-hand vantage point. Armed with this knowledge, the district court will be able to place a case in context according to the degree of the defendant's reprehensibility and the other *BMW* guideposts.

Accordingly, nothing beyond an abuse of discretion standard is indicated by the value of policing punitive awards to ensure comparability and proportionality. As this Court explained in *Gasperini*, in the course of holding that federal appellate courts should not decide for themselves whether a damages award "materially deviates from what is reasonable compensation," "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of [New York's] 'deviates materially' check." 518 U.S. at 438. "Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Id.* (citation omitted); see also *id.* at 448 (Stevens, J., dissenting) ("As a matter of federal-court administration, we have recognized in other contexts the need for according some deference to the lower court's resolution of legal, yet fact-intensive, questions.").

Further, the abuse of discretion standard fully accommodates

the role of the appellate courts as expositors of federal law because it encompasses review for legal error. See *Koon*, 518 U.S. at 100 ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."); *Gasperini*, 518 U.S. at 448 (Stevens, J., dissenting) ("it is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402, 405 (1990) (same). Abuse of discretion review therefore gives the courts of appeals ample opportunity to ensure the proper development of constitutional principles regarding excessiveness. Where an appellate court holds that it was an abuse of discretion for a district court to rely on certain incorrect legal conclusions, it advances the clarity of the law just as much as if it had reversed the district court after conducting de novo review.

Petitioner further asserts that de novo review is appropriate to enable judges on the courts of appeals to develop and draw upon accumulated experience with punitive damages cases. Pet. Br. 15-16. This claim is utterly fanciful, for relatively few punitive damages cases are appealed in the federal courts. According to petitioner's amicus General Dynamics, federal appellate courts have heard only 19 punitive excessiveness cases in the nearly five years since *BMW* was decided where the challenged award was $1 million or more. See Gen. Dynamics Br. (appendix). By comparison, there are 141 circuit judges on the regional courts of appeals, with an additional 76 senior circuit judges. The notion that, under de novo review, appellate judges will develop the kind of individual expertise that petitioner supposes is therefore without any foundation. The tip of the iceberg that a court of appeals judge sees, moreover, may not be a reliable cross-section of cases, for it will undoubtedly involve matters in which the appellant believes that the facts are aberrant and therefore make a more appealing case for correction by the higher court.

The costs of petitioner's proposal to the already overburdened federal courts of appeals would be staggering. For de novo

review would require those courts to engage in time-consuming examination of usually voluminous and sometimes mammoth district court records. Given "overloaded dockets [that] threaten the federal appellate system," *Behrens* v. *Pelletier*, 516 U.S. 299, 322 (1996) (Breyer, J., joined by Stevens, J., dissenting), an appellate standard of independent review is highly inadvisable. Burdening the courts of appeals with de novo review will make it even more difficult for them to craft well-written opinions articulating the courts' reasoning and contributing to the development of the law. The Administrative Office of the U.S. Courts has warned that "[f]ederal judges have seen their caseload and associated workload rise significantly over the past five years."[18] Cases filed in the courts of appeals have increased 9.2% since 1995, while the number of cases pending has increased by 13.3%.[19] Vacancies on the courts of appeals are a matter of growing concern. The Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Justice White, concluded:

> By any measure, the courts of appeals of today are handling more cases, and more work, than their predecessor courts. With only brief respites after new judgeship bills took effect, circuit judges have been faced with relentlessly increasing caseloads since the beginning of the upswing in appeals in the 1960s. * * * Since 1960, circuit judgeships have grown by roughly 160%, but appeals per judgeship have grown by 450%.

FINAL REPORT, Submitted to the President and the Congress Pursuant to Pub. L. No. 105-119, at 14 (Dec. 18, 1998); see *Anderson* v. *Bessemer City*, 470 U.S. 564, 574-75 (1985)

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[18] JUDICIAL BUSINESS OF THE UNITED STATES: 1999 ANNUAL REPORT OF THE DIRECTOR 15 (Mar. 14, 2000).

[19] *Id.* at 16.

("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

Petitioner argues for de novo appellate review largely on the basis of unsupported attacks on federal district court judges. For example, petitioner contends (with no evidence) that district judges are "for the most part, less experienced and adept at handling the requisite legal questions." Pet. Br. 11. Petitioner refers – again, with no support – to the "inflamed passions" of federal "trial judges." *Id.* at 27.[20] These ad hominem attacks on members of the federal judiciary have no basis in fact and provide no basis for deciding the question presented.

Moreover, as this case illustrates, the district courts are at least as willing and able as their appellate counterparts to address punitive damages issues. In this case, petitioner sought, and was permitted, to file no fewer than six post-trial briefs in the district court with respect to the punitive damages award. On appeal, Cooper apparently had a less favorable view of the Ninth Circuit's ability to apply the *BMW* guideposts in satisfactory fashion, for it raised the excessiveness issue on appeal only as a cursory afterthought. Cooper devoted merely 5½ pages of its briefing (out of 95 pages in total) to the issue and did not mention it at oral argument. Cooper's own litigation strategy in this case belies its claim that the appellate courts are a more suitable forum for punitive damages review.

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[20] Petitioner's own amici do not share its cynical view. General Dynamics contends that "the vast majority of appellate courts have ignored or misapplied" *BMW*, providing little reason to give those courts a de novo role in excessiveness review. Gen. Dynamics Br. 2. Another amicus supports the competence of district courts, citing a district court decision to show that courts "have the experience and the access to information necessary to determine whether a particular dollar figure is or is not excessive * * *." Chamber Commerce Br. 12-13.

B. Petitioner Would Create a Multipart Standard of Review.

There are other powerful practical reasons as well for an abuse of discretion standard. Excessiveness challenges ordinarily arise in the context of Rule 59 motions, where they are combined with other grounds for new trial, such as evidentiary questions, improper summations, and jury instructions. From a pragmatic standpoint, it makes little sense for an appellate court to follow petitioner's suggestion (Pet. Br. 26 n.19) of engaging in the awkward exercise of applying de novo review to the district court's order with respect to the *BMW* guideposts, while simultaneously applying abuse of discretion review to the *very same order* with respect to state-law excessiveness standards and other new trial issues under Rule 59. As petitioner's own amicus the Association of American Railroads states, "there is no reason to create multipart standards, where some questions are reviewed de novo and others for abuse of discretion." RR Br. 5. Indeed, the same portion of the district court's decision may provide a common predicate for the federal constitutional and state-law excessiveness questions. "[A] Rule 59 determination does not involve strictly or even primarily issues of the constitutionality of the verdict, and this Court has favored a single, unitary appellate standard of review that applies to the entirety of the district court's order." RR Br. 16. "[W]hen an issue implicates the substantial discretion of the district court, even though questions of law may arise, this Court has repeatedly held that the abuse-of-discretion standard is proper." *Id.* See, *e.g.*, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403, 405 (1990) (holding that "a unitary abuse-of-discretion standard" governs "all aspects of a Rule 11 proceeding" and rejecting proposal for a "three-tiered standard of review").

C. There Is No Constitutional or Due Process Right to De Novo Review.

Petitioner fails to identify any principle of law that would require a standard more stringent than abuse of discretion review by appellate courts. Petitioner suggests that constitutional issues demand de novo review (Pet. Br. 18), but such review is certainly not required as a matter of due process. There is, after all, no due process right to appellate review at all – let alone to de novo appellate review. See, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-58 (1987); *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *District of Columbia* v. *Clawans*, 300 U.S. 617, 627 (1937); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). "One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." *Pittsburgh, Cincinnati & Chi. Ry.* v. *Backus*, 154 U.S. 421, 426-27 (1894).

Although *Honda Motor Co.* v. *Oberg* held that a state could not deny judicial review of the size of punitive awards altogether, it did not hold that such review was required to be performed by an appellate court rather than a trial court. Nor did it require that the review be de novo. The common-law tradition of extremely limited appellate review demonstrates that independent review by an appellate court cannot possibly be required by due process. *Haslip*, 499 U.S. at 17-18 ("[T]he common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method."); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 730 (1988) ("'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'") (quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922)).[21]

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[21] This Court originally held that the Seventh Amendment prevented federal courts from granting judgment as a matter of law to the losing party after a jury's verdict, even when there was no legally sufficient evidence to

This Court has steadfastly declined to use the Constitution to append specific new procedural devices to the traditional requirements of notice, a meaningful opportunity to be heard, and a neutral decisionmaker.[22] There is no warrant for enacting "a rigid constitutional code of procedural necessities." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985). Indeed, petitioner's topsy-turvy argument would produce greater procedural protections for civil defendants in cases involving simple money damages than for criminal defendants in cases where liberty or even life is at stake.[23]

In a wide variety of contexts, this Court has held that lower court rulings involving constitutional issues may permissibly

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support the verdict. *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913). Such a result was not thought to violate due process, and not until the fiction was developed of submitting the case to the jury while reserving a directed verdict motion did the Court hold that post-trial grant of judgment as a matter of law was permitted by the Seventh Amendment. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935).

[22] See *TXO*, 509 U.S. at 465 ("While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation."); *Haslip*, 499 U.S. at 23 n.11 (standard of clear and convincing evidence not required by due process); *Browning-Ferris*, 492 U.S. at 260 (the "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties").

[23] In the criminal forfeiture context, this Court has held that the ultimate question of "whether a fine is constitutionally excessive" is subject to de novo review, *United States* v. *Bajakajian*, 524 U.S. 321, 336 n.10 (1998), but this Court has held that the Excessive Fines Clause does not apply at all to punitive damages. *Browning-Ferris*, 492 U.S. at 260. Instead, punitive damages are governed by the Seventh Amendment and the historical tradition of deferential judicial review. Further, in *Bajakajian*, this Court noted the need to defer to the district court's factual findings: "[t]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous." 524 U.S. at 336 n.10.

receive deferential appellate review. See *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986) ("We note, however, that no broader review is authorized simply because this is a constitutional case"). For example, under the habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1), state court decisions involving federal claims (including constitutional claims) are reviewed deferentially. This Court has explained that "a federal habeas court * * * should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams* v. *Warden*, 120 S. Ct. 1495, 1521 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 1522. See also *Ohio* v. *Robinette*, 519 U.S. 33, 39-40 (1996) (under Fourth Amendment, voluntariness is question of fact subject to deferential review, because "bright-line rule[s]" are inapplicable and Court has taken a "traditional contextual approach") (internal citation omitted); *Batson* v. *Kentucky*, 476 U.S. 79, 98 n.21 (1986) (deferential review of whether peremptory challenge exercised in violation of Equal Protection Clause); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. at 336 (O'Connor, J., joined by Blackmun, J.) ("This Court, like other appellate courts, has always applied the 'abuse of discretion' standard on review of a preliminary injunction," even in cases involving First and Fifth Amendment claims); *Hunter* v. *Underwood*, 471 U.S. 222, 229 (1985) (deferential review of findings of "legislative intent" animating unconstitutional state statute); *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985) (deferential review of juror bias in capital case, even though "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears"); *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983) (abuse of discretion governs decision to grant continuance, despite Sixth Amendment claim); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (applying abuse of discretion

review to preliminary injunction in First Amendment case).[24]

Contrary to petitioner's suggestion (Pet. Br. 16), legal determinations by district courts do not automatically receive de novo review. Where the district court's superior vantage point gives it special expertise, as in the case of punitive damages, its rulings often receive abuse of discretion review. For example, in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990), this Court held that, in the Rule 11 context, reviewing courts should defer to district courts' conclusions about substantial legal justification, even though such matters present issues of law. This Court explained that such rulings were "rooted in factual determinations" and that "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." *Id.* at 401-02.

In *Pierce* v. *Underwood*, 487 U.S. 552 (1988), this Court held that abuse of discretion was the proper standard of review of a district court's determination under the Equal Access to Justice Act that the position of the United States was "substantially justified." Even though the question was legal in nature, this Court explained that it would "turn upon not merely what was the law, but what was the evidence regarding the facts." *Id.* at 560. This Court also noted the need to avoid "requiring the court [of appeals] to undertake the unaccustomed task of reviewing the entire record." *Id.* Similarly, a court of appeals must apply an abuse of discretion standard when it reviews a trial court's decision to admit or exclude expert testimony under the factors of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

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[24] See also *Hernandez* v. *New York*, 500 U.S. 352, 363-70 (1991) (plurality opinion) (declining to extend *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), to peremptory challenges); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) (even in First Amendment context, "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses'") (quoting *Bose*, 466 U.S. at 499-500)).

589 (1993);[25] to dismiss a case on grounds of forum non conveniens, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981); to dismiss an in forma pauperis complaint on grounds of frivolousness, *Denton* v. *Hernandez*, 504 U.S. 25, 33 (1992); to dismiss a prosecution for violation of the Speedy Trial Act, *United States* v. *Taylor*, 487 U.S. 326, 335-36 (1988); to award attorney's fees under 42 U.S.C. § 1988, *Hensley* v. *Eckerhart*, 461 U.S. 424, 432, 436-37 (1983); to invoke collateral estoppel, to grant or deny intervention, to certify a class action, to issue a preliminary injunction or declaratory judgment, and to make a host of other decisions even when they ultimately rest on legal determinations. See generally 1 Steven Alan Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW §§ 4.08-4.19 (3d ed. 1999); see also Brief for the United States in *Buford* v. *United States*, No. 99-9073 (arguing that a court of appeals should apply a deferential rather than de novo standard to a district court's legal determination that a defendant's prior sentences were not "related" within the meaning of Application Note 3 to Sentencing Guidelines § 4A1.2).[26]

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[25] See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 138-39 (1999); see also *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997) (reversing court of appeals' judgment that applied an "overly 'stringent' review" to trial court's *Daubert* ruling).

[26] *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991), is not to the contrary. There, this Court opined that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question." *Id.* at 233 (citation omitted). Moreover, issues of state law are not always reviewed de novo. This Court will usually "defer to the construction of a state statute given it by the lower federal courts * * * to reflect [the] belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); see also *McMillian* v. *Monroe County, Ala.*, 520 U.S. 781, 786 (1997) (where § 1983 claim hinges on whether sheriff is a "policy maker," as defined by state law, Court notes that it will "defer considerably to [Eleventh Circuit's] expertise in interpreting Alabama law").

For all these reasons, this Court should not depart from abuse of discretion as the proper standard for review of a district court's determination of an excessiveness challenge.

III. PROPERLY CABINED, "DE NOVO" REVIEW WOULD AMOUNT TO THE SAME THING AS ABUSE OF DISCRETION.

Unless it were given an improperly expansive scope, a standard of "de novo" review would not reach appreciably different results from abuse of discretion review, and therefore provides no basis for upsetting the Ninth Circuit's judgment in this case. Correctly conceived, the question under de novo review ought to be whether the district court's judgment denying an excessiveness challenge is rational, drawing all reasonable factual inferences in its favor. As this Court explained in *Honda Motor Co.* v. *Oberg*, "[t]here may not be much practical difference between review that focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979) (whether 'no rational trier of fact could have' reached the same verdict)." 512 U.S. at 432 n.10. Petitioner itself assures this Court that it "does not suggest * * * that the appellate courts must somehow divine the exact amount of punitive damages necessary to punish and deter a defendant's misconduct." Pet. Br. 10.

This Court has articulated the "reasonableness" or "rational factfinder" standard in other punitive damages cases. *E.g.*, *Oberg*, 512 U.S. at 429 ("evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing"); *TXO*, 509 U.S. at 461 (examining what "the record evidence would support" and what "the jury could well have believed"); *id.* at 462 ("On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole

or in part, the lucrative stream of royalties that it had ceded to Alliance.").[27]

The "rational factfinder" test is an objective one that focuses on the record before the jury. It "does not permit a court to make its own determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached." *Jackson*, 443 U.S. at 319-20 n.13. "This familiar standard gives full play to the responsibility to the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. Historically, remittiturs have been imposed according to the *maximum* amount that a reasonable jury could have awarded. Wright & Miller, *supra*, at § 2815 ("[R]eduction only to the highest amount that the jury could properly have awarded * * * is the only theory that has any reasonable claim of being consistent with the Seventh Amendment."); see also *Dimick*, 293 U.S. at 480-81.

Under this standard, all reasonable factual inferences must be drawn in favor of the jury's verdict and the district court's judgment. *E.g.*, *BMW*, 517 U.S. at 585 (assuming truth of jury's findings "[n]otwithstanding the evidence adduced by BMW"); *TXO*, 509 U.S. at 447 ("The jury verdict in respondents' favor, which has been affirmed by the Supreme Court of Appeals of

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[27] See also *Herrera* v. *Collins*, 506 U.S. 390, 402 (1993) (review under *Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); Tr. of Oral Arg. in *Honda Motor Co.* v. *Oberg*, No. 93-644 (Apr. 20, 1994), 1994 U.S. Trans. LEXIS 150, at **13-14 (questioning by Justice O'Connor as to "why should the constitutionally mandated review be any more than is required in a criminal case" under "the *Jackson* standard," leading petitioner's counsel Andrew L. Frey to state: "I have no problem with that standard. That's what we would like to see the Court supply."); PLAC Br. 7 ("For purposes of the inquiry into constitutional excessiveness, the reviewing court assumes the jury acted 'rationally' in light of the evidence before it * * *.").

West Virginia, makes it appropriate to accept respondents' version of disputed issues of fact."); see also *Gasperini*, 518 U.S. at 434 ("We must give the benefit of every doubt to the judgment of the trial judge."); *id.* at 443 (Stevens, J., dissenting) ("mixed questions require courts to construe all record inferences in favor of the factfinder's decision"); *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996) (even under de novo standard, "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (inferences from the facts must be "'viewed in the light most favorable to'" the nonmovant).[28]

In the end, therefore, a de novo standard would not be significantly different from an abuse of discretion standard, in practical effect, and would provide no basis for upsetting the Ninth Circuit's judgment.

IV. THIS COURT SHOULD AFFIRM THE JUDGMENT REGARDLESS OF THE APPLICABLE STANDARD OF REVIEW.

There is overwhelming record evidence of the reasonableness of the punitive award in this case. The award would be sustained under any standard of appellate review.

Cooper had fair notice that its willful misconduct could subject it to punitive damages. Cooper passed off a touched-up photograph of Leatherman's product as its own; copied a drawing of Leatherman's tool and represented it as its own; permitted others to continue to publish the misleading Leatherman photograph despite a preliminary injunction; and created new marketing materials after the injunction was entered.

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[28] Even under de novo review, a court of appeals is not permitted to find facts itself under a corrected version of the law. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-14 (1986).

Cooper did all of this in order to sell an inferior tool. ER 594. Cooper knew very well that what it did was wrong. It stipulated to an injunction and did not appeal the jury's finding of passing off or willfulness. Under the Oregon Unlawful Trade Practices Act, a person found to have willfully used an unlawful trade practice in a suit instituted by the state may be penalized up to $25,000 *per violation*. Or. Rev. Stat. § 646.642(3) (1999). Willful violation of an injunction entered pursuant to the UTPA may be penalized $25,000 *per violation*. *Id.* § 646.642(1). In this case, thousands of copies of the advertising materials showing the Leatherman Tool were distributed by Cooper and its vendors. J.A. 32-45; ER 622-27, 1061-69.

The potential harm to Leatherman (and gain to Cooper) was substantial. Cooper's own internal documents reveal that it planned to capture 5% of Leatherman's business, estimated by Cooper to be $3 million for the first five years. But for Leatherman's prompt action, Cooper would have reaped this illicit gain. Charged in part to calculate "the sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future," J.A. 14, the jury properly returned an award commensurate with Cooper's expected gain and Leatherman's potential loss. Accordingly, the award in this case is reasonable under the logic of *TXO*, which upheld a ratio of 526 to 1 based on "the tremendous financial gains that TXO hoped to achieve" and "the amount of money *potentially* at stake," 509 U.S. at 461, 462 (plurality opinion), had the wrongdoer's scheme been allowed to unfold unchecked.

Moreover, despite the extreme brevity of Cooper's excessiveness argument in the court of appeals – and its failure to litigate the question of the appropriate standard of appellate review – the Ninth Circuit in fact found that the district court's decision to uphold the award was "*supported by the evidence.*" Pet. App. 3a (emphasis added). The court of appeals itself found that the misconduct "gave Cooper an unfair advantage by allowing it to use the sweat of Leatherman's efforts to obtain a 'mock-up' more cheaply, easily, and quickly than if it had started

from scratch or waited until samples of its own product were ready." *Id.* at 4a. "Additionally, there was evidence that Cooper did not act promptly to remedy the problem even after an injunction issued, which suggests an indifference to legal consequences." *Id.*

Given Cooper's failure to litigate the standard of review issue in the Ninth Circuit, it is not surprising that the court of appeals framed its holding in the familiar "abuse of discretion" language. But it is clear that the district court's judgment would be affirmed under any standard of review. Indeed, it would be inequitable in this case to reward Cooper with a remand to the Ninth Circuit for another bite at the apple when it failed even to present the standard of review issue to the Ninth Circuit in its first appeal. The judgment below should be affirmed because it is plain, under any standard of appellate review, that the district court properly entered judgment for Leatherman.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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(19)

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In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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OTHER AUTHORITIES

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Theodore Sedgwick, *A Treatise on the Measure of Damages* 522 (4th ed. 1868) 15

Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 4.23 (3d ed. 1999) 9

REPLY BRIEF FOR THE PETITIONER

In its effort to preserve the grossly excessive punitive damage verdict assessed below, Respondent puts its own twist on the facts, misstates Court precedents, and distorts the position of Petitioner. The result is a triumph of irrelevancy. Carefully scrutinized, Respondent's arguments do nothing to undermine the force of Petitioner's claim. On the sole issue presented—*i.e.*, the proper standard for evaluating a trial court's ruling on a challenge to the constitutionality of a punitive damage award—this Court should rule that only an independent, *de novo* review can ensure that the Due Process Clause functions effectively as a safeguard against the imposition of grossly excessive punitive awards.

REPLY TO FACTUAL MISREPRESENTATIONS

Although of only marginal relevance to the single legal issue on which this Court granted certiorari, Respondent's Statement of the Case takes unwarranted liberties with the record that first demand correction.

1. Seeking to exaggerate the so-called reprehensibility of Petitioner's conduct, and also ratchet up its own "potential damages," Respondent gratuitously faults Petitioner for (i) copying a Leatherman PST rather than designing an original tool, and (ii) attempting to overtake five percent of Respondent's market share. (Br. 1-2). Yet, the Ninth Circuit, in vacating the jury's trade dress infringement verdict, expressly adjudged Petitioner's copying of the unpatented PST to be *entirely legal*. (Pet. App. 10a-16a). Respondent is, therefore, less than candid in its suggestion that Petitioner's references to long-term market goals and projected profit margins have a connection to the measure of damages flowing from Petitioner's false advertising.

2. Respondent also highlights Petitioner's decision not to recall all improper marketing materials from its sales personnel until November 20, 1996. (Br. 3, 6). Nowhere

emphasized, however, is the more telling (and wholly undisputed) fact that Petitioner voluntarily removed the ToolZall from the marketplace in October 1996, barely two months after introducing the product. (Tr. 733). Thus, even if consumers had sought to purchase a ToolZall thereafter based on the initial ad—and there is no record evidence to that effect—they would have been unable to do so because the item had been discontinued. Any placement of the ad in publications in the late Fall of 1996, therefore, had absolutely no effect on Respondent's sales or reputation. Stated another way, Respondent could not possibly have incurred any injuries from Petitioner's advertisements appearing after October 1996.

3. Respondent further argues here that Petitioner's use of a PST mock-up in ToolZall advertisements created confusion and "may" have caused retailers to place orders for the ToolZall under the belief that it was manufactured by Respondent. (Br. 3). This theory has absolutely no record support. Moreover, Respondent advances it as though oblivious to the Ninth Circuit's holding that Petitioner had a legal right to copy the PST and sell it to the public. Also inconvenient to this theory, and thus apparently not worthy of mention by Respondent, is the appeals court's explicit statement that, because the visual distinctions between the mock-up photo and the genuine ToolZall were virtually imperceptible, consumers purchasing a ToolZall based on the mock-up photo would have received exactly the item for which they paid. (Pet. App. 3a).

4. Finally, Respondent insists that the $4.5 million punitive damage award was not excessive when analogized to Oregon's Unlawful Trade Practices Act ("UTPA"), a statute authorizing the state attorney general to pursue penalties of $25,000 *per violation* for the commission of prohibited acts. (Br. 7). Not surprisingly, Oregon case law nowhere supports such a post-hoc multiplier theory. Here, Petitioner prepared a *single* mock-up of a modified PST which was furnished to its resellers in a *single* distribution. Those resellers' subsequent use of the mock-up in their own advertisements—and the

extent to which they might have done so is unknown—in no way suggests that Petitioner engaged in an additional, discrete UTPA violation each time an ad was run, particularly after Petitioner had removed its ToolZall from the market.

ARGUMENT

I. Recent Supreme Court Case Law Addressing Substantive Due Process Limitations on Punitive Damage Awards Is Not Critical of Independent Appellate Review

Upon reading Respondent's discussion of this Court's recent punitive damage precedents, one might think that the standard of review issue presently before the Court is already well settled. Respondent even asserts that "this Court has repeatedly addressed the issue of judicial review of punitive damage awards and has consistently rejected any form of independent or de novo scrutiny by federal appellate courts." (Br. 11). This contention irresponsibly misstates the Court's prior decisions.

Respondent cites prominently to the abuse of discretion language in both *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996). As Petitioner noted in its opening brief, however, the dicta in *Browning-Ferris* revolved around the appellate review standard for trial court determinations of punitive damage excessiveness only in the context of discretionary Rule 59 new trial motions. 492 U.S. at 278-79. The Court did not address the issue here concerning the proper review for non-discretionary, constitutional inquiries into legal excessiveness. The distinction is critical; the latter probes whether the jury's punitive verdict is sustainable *as a matter of law*, while the former asks whether, on the record as a whole, *the trial judge's opinion* that the verdict comports with the interests of justice can be sustained.

Likewise, *Gasperini* is not controlling. That case did not even involve punitive damages, and the Court there was not called upon to decide the review standard for testing the constitutionality of a punitive award. Rather, the Court in *Gasperini* focused only on *compensatory* damages, holding that the Seventh Amendment's Reexamination Clause dictated deferential review of a claim of excessiveness in such a context. In addition to the Seventh Amendment concerns, deferential review was the recommended course because the judicial inquiry revolved around the jury's historical fact determinations as to the extent of plaintiff's injury. By contrast, with punitive damages the calculation of an appropriate award is not a "fact" that is "tried" to the jury. *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting). Consequently, neither constitutional nor prudential considerations favor deferential review with respect to punitive damage verdicts.

Respondent also badly misreads *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). While holding that the common law method for assessing punitive damages is not *per se* unconstitutional, the Court made clear in *Haslip* that its ruling on facial constitutionality was "not the end of the matter." *Id.* at 18. It then proceeded to thoroughly scrutinize the facts of the case. In ultimately upholding the award, the Court relied in large part on the Alabama Supreme Court's development and consistent application of "detailed substantive standards" to evaluate punitive damages on appeal. *Id.* at 21. The Court remarked that this rigorous appellate review distinguished Alabama's system from problematic schemes in other states in which punitive awards could be modified only if they were perceived to be "manifestly and grossly excessive" or the product of such "passion, bias and prejudice on the part of the jury . . . as to shock the conscience." *Id.* at 21 n.10.

Nor does the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), preclude a *de novo* appellate review standard for discerning constitutional excessiveness. That case, in fact, had nothing to

do with excessiveness review in the court of appeals. To the extent the circuit's constitutional analysis parallels that of the district court, it is noteworthy that, although the plurality expressed reluctance to adopt either the "heightened scrutiny" test proposed by the petitioner, or the rational basis test urged by the respondent, *id.* at 455-57, the analysis undertaken in *TXO Production Corp.* was the precursor to the model adopted just three years later in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Far from endorsing deferential review of constitutional challenges to excessive punitive awards, the preceding cases reflect, if anything, a trending in just the opposite direction. For years, this Court resisted, except in purely hypothetical terms, the invitation to impose a substantive due process limitation on punitive damages and adopt objective criteria by which to assess the constitutionality of such awards. With the explosive growth in staggeringly excessive punitive damage verdicts, however, has come an increasing awareness in this Court's decisions that the constitutional implications compel a more demanding scrutiny as a check against awards bearing no reasonable relationship to the conduct in question. The progression from *Browning-Ferris* to *Haslip* to *TXO Production Corp.* to *Gore* has generally been one moving away from deferential review insofar as the constitutional excessiveness of punitive damages is concerned, and toward a more exacting, independent examination. *De novo* appellate review is not a break with that precedent, but the next logical and, Petitioner submits, constitutionally necessary step.

II. Judicial Examination of Punitive Damage Awards for Constitutional Excessiveness Is Essentially a Legal Inquiry

A. There Are No Jury Findings on Which to Defer in the Constitutional Analysis

Respondent defends an abuse of discretion standard of review largely on the theory that the judicial inquiry into constitutional excessiveness is so intertwined with the underlying factual issues tried to the jury that deferential review is required. But the facts tried to the jury (*i.e.*, the historical facts) are clearly not under scrutiny on a claim of constitutional excessiveness of a punitive damage award. Indeed, the constitutional challenge is heard only if the other attacks on the jury verdict fail.[1] The question on appeal at that point is not one of error as to the findings of liability, the award of compensatory damages, or even the determination to mete out punishment. Those issues are established components and, to the extent they remain in dispute, are resolved in the plaintiff's favor unless no reasonable view of the evidence would allow them to be considered in such a manner. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2109-10 (2000); *TXO Prod. Corp.*, 509 U.S. at 447.

The constitutional inquiry, however, is focused elsewhere. As *Gore* teaches, the Court takes as a given the jury's findings on both the defendant's liability and the damages incurred by the plaintiff as a consequence, and examines only whether the punishment imposed is grossly disproportional to

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[1] It is well settled that this Court, like other federal courts, endeavors to entertain constitutional challenges only as a last resort, *i.e.*, only after it is determined that other non-constitutional attacks on the verdict cannot dispose of the case without reaching the constitutional issue. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

the behavior condemned. This analysis calls not for a retrying of historical facts, but for measuring the punitive award (i) on a scale of reprehensibility, (ii) in relationship to the seriousness of the actual or threatened injury, and (iii) through the prism of comparable legal and legislative sanctions. Each of these measurements looks for guidance to outside criteria of general applicability that not only are legal in nature, but were not on trial in the courtroom. There is thus nothing in the guidepost analysis to which either trial or appellate courts have cause to defer in deciding whether a punitive award is unconstitutionally excessive.

Respondent's argument to the contrary strains to link the *Gore* guideposts to the jury's findings on the merits of the case. The "reprehensibility" guidepost, it asserts, is "tied up within the jury's verdict." (Br. 29). Yet, where the defendant's misconduct falls along a continuum of blameworthiness was neither asked of, nor answered by, the jury. Nor is it the sort of question that can be discretely introduced at trial without a claim of unfair prejudice from one side or the other based on opposing counsel's selection of purportedly "comparable" conduct.

The comparison between the jury's compensatory and punitive awards is no more an issue for the jury. By quoting *Gore* completely out of context, Respondent claims that this factor requires an analysis of the "actual harm . . . determined by the jury." (Br. 29). Petitioner concedes that, in applying this ratio guidepost, reviewing courts use as the baseline the amount of compensatory damages left standing following the resolution of any challenges thereto. But identifying that baseline is only the starting point with respect to the proportionality prong of the constitutional excessiveness equation. What is critical is whether the punishment imposed for inflicting harm upon the plaintiff is "within a constitutionally acceptable range" in light of how other similar violators have been punished in the past. *Gore*, 517 U.S. at 583. That question can be answered only through an examination of other experiences found largely in legal precedent. Juries do

not, and should not, engage in such an extrinsic analysis. Courts can and do.

The same can be said for the third of the *Gore* guideposts, *i.e.*, the mandate to look to analogous statutory penalties. Respondent argues that this component does not revolve around abstract legal interpretations of criminal and civil provisions, but implicates factual controversies as to the relationship between the defendant's conduct and the type of behavior punished by the legislative sanction. (Br. 30). Even if true, these are not the sort of "controversies" that are tried to the jury, nor in any meaningful respect discernible from the evidentiary record. The various legislative sanctions that might bear on the excessiveness issue, and their applicability to the conduct found by the jury, are unmistakably legal questions for the court to decide.

There is, accordingly, no part of the *Gore* analysis that suggests, let alone requires, paying homage to the jury's deliberations, since those deliberations do not encompass the guidepost inquiries.[2] Indeed, contrary to Respondent's assertion that *Gore* puts the punitive issue on a deferential review track, Petitioner reads the case as signaling just the opposite. To be sure, the Court there accepted, as it should, those jury findings that were *readily discernible* from the verdict—*i.e.*, elements of the underlying causes of action that were essential to the finding of liability and the award of damages. Affording deference to such historical facts is unremarkable. It does not follow, however, and certainly did not follow in *Gore*, that any such deference extends to the separate inquiries to be asked post-verdict in ascertaining whether the punishment meted out by the jury passes constitutional muster. Examination of those judgment questions was undertaken by the Court *independently* as to each prong.[3]

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[2] The constitutional analysis in no way lends itself to the "rational factfinder" test proposed by *amicus* Professor McEvoy. That standard derives from *Jackson v. Virginia*, 443 U.S. 307 (1979), as a "sufficiency of the evidence" test for assessing a jury's *findings of fact*. Here, by contrast, as noted in Part III, *infra*, the jury is not acting in its traditional role as "factfinder" in levying punitive damages, but is making a separate, and much different *policy judgment* as to matters of retribution and deterrence. In examining whether that policy judgment is constitutionally acceptable, the inquiry plainly is not an evidentiary probe of the factual record undertaken by the "rational factfinder" in *Jackson*. Rather, it is a legal analysis framed by the factors articulated in *Gore*, each of which look to punishment handed out elsewhere for similar or identical conduct in order to determine whether the sanctions imposed in the case at bar have a reasonable relationship to the offense committed. The distinction between the two standards is the difference between a review of the underlying facts, and a review on the law—elevated in this instance to constitutional importance. As with most other constitutional issues, (*see* Petitioner's Opening Br. at 18-23), *de novo* appellate review best safeguards the fundamental right in need of protection.

[3] Respondent maintains that "it makes little sense" for an appellate court to examine *de novo* a trial court's ruling on a constitutional challenge to the excessiveness of a punitive damage award while, at the same time, reviewing the lower court's determination as to whether the punitive award is against the weight of the evidence under an abuse of discretion standard. (Br. 40). That is, however, precisely what appellate courts do routinely when litigants challenge district court rulings on both legal and factual bases. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (trial judge's determination of reasonable suspicion and probable cause is reviewed *de novo*, but historical fact findings undergirding that determination are examined for clear error); Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 4.23 (3d ed. 1999) (overall validity of district court's jury instructions is evaluated *de novo*, but the failure to give a particular instruction is reviewed for abuse of discretion). Respondent's suggestion to adopt for convenience in such circumstances an appellate unitary abuse of discretion standard again loses sight of the fact that the trial court's guidepost analysis endeavors to determine whether the punitive award is unduly excessive *as a matter of law*. For the reasons stated here and in Petitioner's opening brief, this essentially legal inquiry is not properly subject to deferential review.

B. Deference to the District Judge's Legal Conclusions on the Constitutional Excessiveness Analysis Is Unwarranted

Respondent further contends that a deferential review standard should apply because trial judges, by virtue of their participation in the trial proceedings, are better suited than their appellate counterparts to review constitutional excessiveness challenges to punitive damage awards. (Br. 35). Here, too, the argument appears insensitive to the nature of the constitutional issue on review. Respondent seeks to shape the excessiveness inquiry to include not only *Gore*'s guidepost analysis, but also review of factual disputes submitted to the jury and, in post-trial motions, to the district judge. It is these latter disputes—Respondent identified as examples a defendant's good faith, and the question of potential but unrealized harm flowing from a defendant's misconduct—that Respondent claims justify deferential review.

As indicated, however, Petitioner's disagreement with Respondent is not over the review standard that applies to disputed facts tried to the jury, including how those facts may have been treated by the district judge on post-trial motions (whether based on the court's own evaluation of witness credibility and demeanor or otherwise). It is well settled that such findings and determinations are entitled to appellate deference. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

But there is no reason for appellate deference on the ultimate constitutional determination of excessiveness. That inquiry begins where the trial record, as modified by any district court findings on subsidiary matters, ends. The constitutional task is then to assess the *established* facts, viewing any disputed facts on appeal most favorably to the prevailing party, *see Reeves*, 120 S. Ct. at 2109-10, in light of the controlling legal principles. Appellate judges are as well suited as trial judges to perform that assessment. If, of course, the circuit "finds that the district court's analytical sophistication

and research have exhausted" the legal excessiveness inquiry—as surely cannot be suggested from the single sentence of explanation articulated by the trial judge here—"little more need be said in the appellate opinion." *Salve Regina College v. Russell*, 499 U.S. 225, 232-33 (1991). "Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions." *Id.*

Nor do trial judges have any institutional advantage in assessing whether, *as a matter of law*, a particular punitive award has crossed a threshold of rationality into the "zone of arbitrariness." *Gore*, 517 U.S. at 568. Indeed, only appellate decisions carry binding precedential value, and thus they alone can serve as the vehicle for clarifying the governing substantive standards and developing a cogent body of law.[4]

Respondent gains no traction by pointing to *Koon v. United States*, 518 U.S. 81 (1996), as authority for deferential review. The Court there adopted an abuse of discretion standard for reviewing criminal sentences imposed by district courts under the federal Sentencing Guidelines. Unlike here, however, the Court noted in *Koon* that Congress, in the Sentencing Reform Act, had explicitly directed appellate courts to "give due deference to the district court's application of the guidelines to the facts." *Id.* at 97 (quoting 18 U.S.C. § 3742(e)(4)). Moreover, the key issue on review in *Koon*—the propriety of departing from the guidelines—was recognized by the Court as being necessarily and substantially de-

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[4] Respondent dismisses this consideration by suggesting that the number of federal appeals of punitive damage awards would likely be small. (Br. 37). While Petitioner believes otherwise, particularly in light of the increasing number of "staggering" punitive awards in recent years, *see Haslip*, 499 U.S. at 61-62 (O'Connor, J., dissenting), even on Respondent's assumption, this Court remarked in *Gore* that a paucity of cases appealing punitive awards on grounds of excessiveness "does not justify an abdication of [the Court's] responsibility to enforce constitutional protections" in extraordinary cases. *Gore*, 517 U.S. at 586 n.41.

pendent upon fact findings of the trial judge and, as such, an issue that "embodies the traditional exercise of discretion by a sentencing court." *Id.* at 98-100. As already discussed, the same cannot be said of the predominant legal questions presented in a constitutional challenge to the excessiveness of a punitive damage award.

This does not mean that the constitutional inquiry is aimed at producing some bright line result that marks for all cases the precise demarcation between constitutionally acceptable and unacceptable punitive awards. Importantly, the *Gore* inquiry does not seek to isolate the "optimal" or "correct" punitive damages in any given case, but recognizes that there is a wide spectrum of constitutionally permissible punitive awards.[5] *Gore* simply provides the analytical framework for probing whether the jury's award exceeds a legal threshold erected by the Due Process Clause. Both marking and insuring adherence to this boundary require the establishment

[5] The Association of Trial Lawyers of America argues in its *amicus* brief (p. 21) that punitive damages must have a wild-card component lest they be reduced to a mere "cost of doing business" for defendants. While it is debatable whether punitive awards *must* be wholly unpredictable, Petitioner has never suggested that they need fit within some rigid grid. Nor does the present issue in any respect threaten whatever wild-card characteristic may now adhere to the range of possible punitive awards that fall *within* constitutional boundaries. Nevertheless, if the substantive due process protections outlined by this Court are to be more than empty words, there must be a *discernible outer limit* to what is constitutionally acceptable. *See Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."). The only question here is the proper review standard for ascertaining when that outer limit has been exceeded.

and maintenance of clear (and binding) standards that come only with *de novo* appellate review.[6]

While Respondent asserts that discretionary review advances the clarity of the law just as much as a *de novo* standard, (Br. 37), this Court essentially answered that argument in *Salve Regina College*, *supra*. The Court there acknowledged that "the mandate of independent review will alter the appellate outcome only in those few cases where the appellate court would resolve an unsettled issue of . . . law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error." 499 U.S. at 237-38. Even so, the Court emphasized "that the differences between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree. When *de novo* review is compelled, no form of appellate deference is acceptable." *Id.* at 238.

In sum, Respondent's brief offers no reasonable basis for adoption of an abuse of discretion standard on matters relating to the constitutional excessiveness of punitive damage awards. The Due Process Clause cannot function effectively as a bulwark against punitive awards grossly disproportional to the gravity of a defendant's malfeasance if there is not a coherent, analytical framework for appellate judges to apply *independently* as a check against overly excessive punishment. The alternative deferential review applied by the Ninth Circuit here underscores how inadequate an abuse of discretion standard is as a guardian of the constitutional right.

[6] Curiously, Respondent avers that, because there is no constitutional right to appellate review, there can be no right to *de novo* appellate review. (Br. 41-42). As the cases cited in Petitioner's opening brief reflect, (pp. 18-23), this Court has, on multiple occasions, clearly held otherwise. Moreover, even accepting for present purposes that appellate review is not constitutionally *mandated*, its *availability* is unquestioned, particularly on the issue of punitive damage "gross excessiveness."

III. The Seventh Amendment's Reexamination Clause Does Not Foreclose Independent Appellate Review of District Court Punitive Damage Excessiveness Determinations

Independent appellate review of the constitutionality of a punitive damage award is not barred by the Reexamination Clause of the Seventh Amendment. Respondent's contrary argument blurs the critical distinction between compensatory and punitive damages and essentially dismisses much of this Court's holding in *Gasperini*.

A. Historical Treatment of Punitive Damages Is Not an Impediment to Independent Appellate Review

Respondent, citing a litany of early cases holding that questions over the size of general damage verdicts present purely factual issues not subject to reexamination, first claims that there was no appellate review—let alone *de novo* review—available at common law for attacks on the excessiveness of punitive damage awards. (Br. 13-19). Yet this Court fully considered the very same line of jurisprudence in its recent *Gasperini* decision and, while acknowledging its existence, held that this precedent does not foreclose challenges that an award exceeds legal limits. The Court concluded that "[n]othing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside a jury verdict as excessive." *Gasperini*, 518 U.S. at 436 (internal alterations and citation omitted). Recognizing that the "fair administration of justice" dictates a threshold above which damage awards cannot go, a solid majority of the Court agreed that "whether that [threshold] has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Id.* at 435 (quotation omitted).[7]

It is true that the Court conditioned appellate review in *Gasperini* on the adoption of an abuse of discretion standard. *Id.* at 434-36. There, however, the only issue before the Court concerned the excessiveness of *compensatory* damages. In contrast to punitive awards, a jury's determination as to the proper quantum of actual damages sustained by the plaintiff is largely *factual* in nature. Thus, while the portion of the compensatory award constituting "unlawful excess" presents a legal question, *id.* at 443 (Stevens, J., dissenting),

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[7] In a related vein, Respondent urges the Court to reject any dichotomy between compensatory and punitive awards because there was no relevant distinction in the judicial treatment of such awards at common law. (Br. 22-24). The dramatic evolution of punitive damages, however, renders much of this early treatment irrelevant for purposes of the Seventh Amendment. At common law, juries typically awarded only a general damages verdict and did not segregate the punitive component from the compensatory award. James D. Ghiardi et al., *Punitive Damages Law & Practice* § 1.03 (1999); Theodore Sedgwick, *A Treatise on the Measure of Damages* 522 (4th ed. 1868) (noting that punitive damages often came in the form of a "severer verdict"). The judicial task, therefore, of assessing the division between the two different awards (or even the existence thereof) often was extraordinarily difficult and necessarily would have required a thorough examination of the facts. It is only a relatively recent phenomenon that juries have been specifically instructed as to the legal purpose of punitive damages and required to allocate the damage breakdown on their verdict.

Furthermore, punitive awards at common law often filled a necessary gap as a result of the unavailability of compensatory damages for pain, mental anguish, and other ethereal injuries. Ghiardi at § 1.02; *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting). Today non-economic injuries are fully compensable in our tort system. In short, the character and treatment of punitive damages has changed substantially since the time the Seventh Amendment was ratified. Thus, any refusal by early common law courts to entertain challenges to the excessiveness of such awards does not stand in the way of adopting an independent appellate review standard in this case.

deferential review appropriately recognizes that the determination of excessive compensation is significantly rooted in the district judge's own assessment of the record, including matters related to witness demeanor and credibility, to which appellate courts have long deferred.

By contrast, as previously discussed, the calculation of a *punitive* award is not a "fact" that is "tried by the jury." *Id.* at 459 (Scalia, J., dissenting). The objective is not to make the plaintiff whole or to resolve any controversy between the litigants; rather, punitive damages represent a "private fine." *Browning-Ferris*, 492 U.S. at 297 (O'Connor, J., concurring in part and dissenting in part). The jury is merely acting *in loco civitatis*, *see Gore*, 517 U.S. at 572 n.17, making a policy choice as to the degree of sanction necessary to punish the defendant and deter future misconduct. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The Seventh Amendment's Reexamination Clause thus imposes no constraints on appellate review of punitive damages in this context. Indeed, as Justice Scalia has correctly observed, none of the Supreme Court's early cases restricting appellate review of purportedly excessive damages involved punitive awards. *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting).[8]

Respondent nonetheless pursues its Seventh Amendment argument by pointing to a number of cases and treatises stating that punitive damage awards rest within the discretion of the jury. (Br. 20-22 & n.11). These authorities, however,

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[8] Respondent takes issue with the breadth of Justice Scalia's research and insists that *New York, Lake Erie & W. R.R. v. Winter's Adm'r*, 143 U.S. 60 (1892), did apply the Seventh Amendment's restrictions to a punitive damage award. There is no suggestion in that case, however, that the jury's $10,000 verdict represented anything more than a compensatory award. The Court carefully recounted the parade of horribles, which included both economic and physical injuries suffered by the plaintiff as a direct result of defendant's conduct. *Id.* at 62. In outlining the limits on its powers of review, the Court did not even hint that there was a punitive component to the award. *See id.* at 75.

do not suggest that the quantum of punitive damages is a "fact" tried to the jury; they simply underscore the obvious: there is a broad range of constitutionally permissible punitive awards in any given case, and the jury has considerable latitude in selecting a figure therein.[9]

In *Day v. Woodworth*, 54 U.S. 363 (1852), and *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885), for example, the Court did nothing more than uphold the facial constitutionality of punitive damage awards. The only issue in those cases was whether juries were empowered to impose damages in a sum exceeding the plaintiff's actual injuries. The Court responded in the affirmative, and held that a punitive award is traditionally left to the jury's discretion. *Day*, 54 U.S. at 371; *Missouri Pac. Ry.*, 115 U.S. at 521-23. The Court never confronted the question of whether the punitive damage award was *excessive as a matter of law*.

The same is true of *Barry v. Edmunds*, 116 U.S. 550 (1886). In *Barry*, in fact, the Court specifically noted in dictum that the jury's discretion in assessing a punitive award is not absolute and, thus, while generally not to be judicially disturbed, should expect no such deference from the courts if the jury's award is "so excessive or outrageous" as to contravene the rules of law. *Id.* at 565 (citation omitted).

Nor does *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), assist Respondent's Seventh Amendment argument. *Feltner* held only that the Seventh Amendment's jury guarantee applied to the determination of statutory damages under the federal Copyright Act. *Id.* at 353. Neither the availability, nor possible limits, of appellate

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[9] Respondent misreads *Honda Motor Co.* as being to the contrary. (Br. 27-28). The Court there, as is its custom, simply accepted the Oregon Supreme Court's interpretation of Oregon law. 512 U.S. at 426-27 (citing *Van Lom v. Schneiderman*, 210 P.2d 461 (Or. 1949)). There is no suggestion in that opinion that, as a matter of *federal constitutional law*, the proper size of a punitive award is a fact tried to the jury.

review of the jury's award was in question. Clearly, the fact that a jury is vested with responsibility for calculating non-compensatory damages in the first instance in no way suggests that the court of appeals is constrained from scrutinizing that award for legal excessiveness. *Feltner* certainly carries no such suggestion. Indeed, at least with respect to exemplary damages, the exact opposite has historically been the practice:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Haslip, 499 U.S. at 15.

B. *Gasperini* Does Not Require the Adoption of a Deferential Review Standard in this Case

Respondent also relies on *Gasperini* to argue that the Seventh Amendment, if not a bar to reexamination of punitive awards, at least compels no more than deferential appellate review. In this regard, Respondent refers particularly to a footnote in the Court's opinion, *see* 518 U.S. at 435 n.18, that it reads as rejecting any distinction between compensatory and punitive damages for purposes of the scope of appellate review. Read in context, however, the footnote reference does not say what Respondent stretches it to say. The Court's marginal observation equated excessiveness review for compensatory and punitive damages only for the purpose of assessing the governing substantive law. *See id.* ("*[F]or purposes of deciding whether state or federal law is applicable*, the question whether an award of compensatory damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages ex-

ceeds what is permitted by law.") (emphasis added). Nothing in the referenced footnote, nor elsewhere in *Gasperini*, addressed the issue now before the Court as to the proper standard of appellate review when the question presented is whether a *punitive award* is constitutionally excessive.

Petitioner recognizes, of course, that the abuse of discretion standard adopted in *Gasperini* was premised in part on the Court's acceptance of a deferential appellate review standard in *Browning-Ferris* where the size of a punitive damage award was being challenged. *See id.* at 434-35. But the *Browning-Ferris* discussion of deferential review was with specific reference to a Rule 59 challenge that called the punitive award into question as being against the weight of the evidence or otherwise so unjust as to necessitate a new trial. *Browning-Ferris*, 492 U.S. at 278-80. It is well established that "the federal standards developed under Rule 59," *id.* at 279, empower district judges to order a new trial or remittitur even if the verdict is within a constitutionally acceptable range, and that appellate review of such action is deferential. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216-18 (1947).

Notably, however, the Court in *Browning-Ferris* refused to decide the issue presented here as to whether the size of the punitive award violated the Due Process Clause because the petitioner there had failed to raise that issue below. *Browning-Ferris*, 492 U.S. at 276-77. The review standard for constitutional excessiveness has, therefore, yet to be directly addressed by this Court insofar as a punitive award is concerned. Unless due process guarantees no different protection against grossly excessive punitive damage awards than the highly deferential review available under Rule 59, a concept that would render *Gore* and its antecedents superfluous, appellate review of due process challenges must be more demanding than the deferential standard applicable to rulings on traditional new trial motions.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and the case remanded to the circuit with instructions to evaluate Petitioner's constitutional challenge to the punitive damage award under the proper standard of review.

Respectfully submitted,

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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL, THE EMPLOYERS GROUP, AND THE BOEING COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?

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INTEREST OF *AMICI CURIAE*

The California Employment Law Council ("CELC"), The Employers Group ("TEG"), and The Boeing Company ("Boeing") respectfully submit this brief *amici curiae* in support of petitioners to assist the Court in analyzing the important constitutional issues raised in this case.[1] The purpose of this brief is to demonstrate that in order to preserve and enforce the constitutional prohibition against excessive punitive damage awards, independent appellate review of punitive damages verdicts is constitutionally required.

CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development of reasonable, equitable and progressive rules of employment law. CELC's membership includes more than 60 private sector employers in the State of California, which collectively employ well in excess of a half-million Californians. This case is of great interest and importance to CELC's members. CELC is familiar with the questions involved in this case, and believes that the standard of review of constitutional challenges to punitive damages awards is an issue that significantly affects the rights of its members.

The Employers Group is one of the nation's oldest and largest human resources management associations, representing nearly 5,000 companies of all sizes and every industry, which employ approximately 2.5 million

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for both petitioners and respondents have consented to the filing of this *amici* brief in letters that have been lodged with the clerk.

employees. The Employers Group's extensive experience with the legal issues faced by business enterprises of all shapes and sizes provides it with a unique perspective that will hopefully assist the Court in considering the important issues presented in this case.

Boeing is frequently sued in federal and state courts by plaintiffs seeking punitive damages. The randomness of the jury system sometimes results in the return of a verdict awarding punitive damages. Accordingly, Boeing has an interest in the proper resolution of the question presented in this case. For example, Boeing intends to file a petition for a writ of certiorari with this Court seeking review of the decision of the California Court of Appeal in *Verdine v. McDonnell Douglas*, No. B126205, slip op. (Cal. Ct. App. July 26, 2000). In that case, the court of appeal refused to conduct an independent review of the constitutional validity of a $9 million punitive damage award in a single-plaintiff employment case, and instead sustained the award under a deferential standard of review.

Meaningful appellate review is a cornerstone of this Court's jurisprudence and provides an essential protection against unreasonable jury awards. *Amici* are concerned that any standard less rigorous than independent review would denigrate the important concerns identified by this Court in *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), and provide inadequate protection for defendants subjected to unconstitutionally excessive punitive damages awards. Accordingly, *amici* are well situated to assist the Court in resolving the important issues presented in this case.

STATEMENT

Respondent Leatherman Tool Group, Inc., brought this action against petitioner Cooper Industries, Inc., in the United States District Court for the District of

Oregon, asserting claims for violation of the Lanham Act and common law claims for unfair competition, false advertising, and "passing off." Pet. App. 32a. Respondent alleged that petitioner had improperly used respondent's tool in some promotional materials purporting to feature petitioner's product. The case proceeded to a jury trial and the jury awarded respondent $50,000 in compensatory damages and $4.5 million in punitive damages, solely with respect to the common law claims. Petitioner filed a post-trial motion in the district court arguing that the punitive damage award, amounting to ninety times the compensatory damage award, was unconstitutionally excessive under the Due Process Clause. Pet. App. 24a. After the district court refused to reduce this verdict, the Ninth Circuit engaged in a deferential review for abuse of discretion and found that, in light of the evidence at trial, the district court did not abuse its discretion in finding the award permissible. Pet. App. 3a-4a. This Court then granted certiorari to decide whether appellate courts are required to independently review alleged constitutional violations of due process stemming from the assessment of punitive damages.

SUMMARY OF ARGUMENT

In numerous contexts, this Court has repeatedly ensured that constitutional protections are fully observed by requiring appellate courts to rely on their own independent review of constitutional matters of law. This Court has also extended independent review to certain "constitutional facts" in an effort to guarantee that important constitutional protections are not undermined by inadequate provisions for searching judicial review. The same principles require application of independent appellate review in the area of excessive punitive damage awards.

Punitive damages may properly be imposed by States and the federal government to further governmental

interests in punishing unlawful conduct and deterring its repetition. This Court has made clear, however, that this power is limited, because if punitive awards are "grossly excessive," they enter a "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996). Despite this Court's announcement of the federal constitutional limits on punitive damage awards, the incidence of constitutionally unreasonable punitive damages is on the rise. Unless the Court ensures meaningful appellate review of jury awards, the constitutional protections recognized in *BMW* will be undermined. Meaningful review requires independent appellate review, regardless of whether the excessiveness inquiry is viewed as a question of law (as it should be), as a question of constitutional fact, or as a mixed question of law and fact. Independent appellate review would enhance, and is fully consistent with, the analysis laid out by this Court in prior cases.

ARGUMENT

I. The Protection Against Excessive Punitive Damages Is Firmly Rooted In The Constitution

This Court has repeatedly held "that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion) (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)); *see Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994) ("the Constitution imposes a substantive limit on the size of punitive damage awards"). The constitutional prohibition against excessive punitive awards and sanctions has long been recognized in this Court's Due Process Clause jurisprudence. *See Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) (setting aside a penalty imposed on a telephone company because it was so "plainly arbitrary and oppressive" as to violate

the Due Process Clause). Justice Kennedy's concurrence in *TXO* aptly describes the important and weighty interests involved in the imposition and review of punitive damage awards:

> [The Constitution's] fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.

509 U.S. at 467.

Accordingly, the Court's jurisprudence in this area has recognized that the Constitution provides an upper limit on punitive damages so a defendant has "fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996); *see Honda Motor Co.*, 512 U.S. at 420. This protection against excessive punitive awards is a fundamental and important part of our constitutional panoply of rights.

II. Independent Appellate Review Of Excessive Punitive Damages Is Necessary To Protect The Rights Guaranteed Under The Due Process Clause

In order to preserve the constitutional protections underlying this Court's due process jurisprudence in the area of punitive damage awards, meaningful judicial review of punitive damage awards is required at both the trial and appellate level. Meaningful appellate review aids the development of the law, but more fundamentally it acts as an essential layer of support for those values we hold dear. Because constitutional rights are our

most cherished rights, courts have always had an unflagging obligation to make certain they are not infringed upon. The importance of rigorous appellate review in the constitutional context is illustrated by this Court's discussion in *Bose Corp v. Consumer Union*, 466 U.S. 485 (1984):

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan*, [376 U.S. 254 (1984)] is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution .... Judges as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold ....

Id. at 510-511.

While *Bose* arose in the First Amendment context, the *Bose* Court's analysis applies with equal force in cases involving enforcement of the Due Process Clause's prohibition against grossly unreasonable punitive damage awards. The need for searching review is most acute when constitutional interests are at stake.

A. The Danger Of Excessive Awards Is Significant

Many members of the Court have expressed concern about the due process implications of runaway jury verdicts, especially the potential that juries will be left with no meaningful standards to constrain excessive punitive damage awards. In *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991), for example, the Court stated that it and many "individual Justices thereof on a number of occasions in recent years ha[d] expressed doubts about

the constitutionality of certain punitive damages awards." In the earlier case of *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), Justice Brennan remarked that "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating decision." *Id.* at 281 (Brennan, J., concurring). Also in *Browning-Ferris*, Justice O'Connor cogently observed that "[a]wards of punitive damages are skyrocketing .... I adhere to my comments ... regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Id.* at 282-83 (O'Connor, J., concurring in part and dissenting in part).

The Court is not alone in its recognition of the increasing frequency of punitive damage awards. Numerous commentators have also addressed this issue. *See, e.g.*, Russel Myles & Kelly Reese, *Arbitration: Avoiding The Runaway Jury*, 23 AM. J. TRIAL ADVOC. 129 (Summer 1999); Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003 (1999); John Calvin Jeffries, Jr., *A Comment On The Constitutionality Of Punitive Damages*, 72 VA L. REV. 139 (1986) ("As everyone who reads the newspapers must know, the American civil liability system is approaching a crisis. One prominent aspect of this crisis is the problem of punitive damages. In my view, punitive damages are out of control."); James C. Goodale, *Why Did the Enquirer Pay $ 10 Million?*, N.Y. L.J., Aug. 7, 1998, at 3 (discussing how fear of an outrageous verdict may have caused huge settlement). These realities only enhance the need to provide adequate procedural protections to prevent encroachment on the fundamental liberties guaranteed under the Due Process Clause.

B. The Absence Of Effective Appellate Review Endangers Due Process

The decisions of this Court indicate that the absence of effective judicial review of punitive damage awards can threaten the integrity of a jury award so fundamentally as to amount to a violation of due process. In *Honda Motor Co.*, the Court considered the constitutional validity under the Fourteenth Amendment of a state constitutional provision that barred judicial review of the amount of punitive damages awarded by a jury unless there was "'no evidence to support the verdict.'" 512 U.S. at 418 (citation omitted). The jury in that case had awarded $5 million in punitive damages, and the lower state courts refused to reduce the award despite Honda's argument that it violated the Due Process Clause. *See id.* The Oregon Supreme Court affirmed, holding that there was no constitutional requirement that state courts always review punitive damage awards for excessiveness. *See id.* at 419.

On review, this Court began by recognizing the federal constitutional right to be free from excessive punitive damages, and then turned to the question whether judicial review is required as a matter of due process. The Court found that "[j]udicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," *id.* at 421, and that the need for such review had only increased as "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." *Id.* at 431. The Court then concluded that the Oregon procedure could not pass constitutional muster. *See id.* at 430-32. The Court explained that judicial review of punitive damages was "one of the few procedural safeguards which the common law provided against" the "acute danger of arbitrary deprivation of property." *Id.* at 432. Accordingly, the "denial of judicial review of the size of punitive damage awards violates the Due Process Clause." *Id.*

The *Honda* decision built on the Court's earlier recognition in *Haslip* that a post-verdict judicial review of punitive damage awards is a crucial component of a permissible scheme for the imposition of punitive damages. In *Haslip*, the Court recognized "that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 499 U.S. at 18. The Court permitted the award to stand in *Haslip* only because it found that "[t]he Alabama Supreme Court's postverdict review ensure[d] that punitive damages awards [we]re not grossly out of proportion to the severity of the offense and ha[d] some understandable relationship to compensatory damages." *Id.* at 22.

Accordingly, meaningful appellate review is not only advisable, but constitutionally necessary to ensure due process. It is only with judicial review that the rights enshrined in the Constitution can be effectively preserved.

C. The Assessment Of Excessive Punitive Damage Awards Is A Question Of Law That Should Be Subject To Independent Review

To obtain this meaningful review with regard to punitive damage awards, independent judicial consideration of their amount and validity should be required. The resolution of punitive award cases turns on questions of law that traditionally have been subject to independent review.

"[T]he Court has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.'" *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)). "Perhaps much of the difficulty in

this area stems from the truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." *Miller v. Fenton*, 474 U.S. at 113-14 (citation omitted). The Court has frequently made the classification based on its assessment of whether one judicial actor is better suited to the task than another. *See id.* at 114. For example, the Court has sometimes treated questions as presenting issues of fact when witness credibility is important, or has classified questions as issues of law when the role of a federal appellate court as the expositor of law was threatened, as with the issue of "actual malice" in the First Amendment context. *See id.*

Other questions may lack a specific classification, but the Court's approach indicates the nature of the inquiry. In *BMW*, for example, although the Court never stated whether it considered the excessiveness issue to present an issue of law or fact, the circumstances make clear that the Court was treating the case as presenting a question of law. *BMW* arose out of the review of an Alabama state court proceeding. *See* 517 U.S. at 563. This Court has repeatedly reaffirmed its unwillingness to review fact finding by state courts. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980) ("we customarily accept the factual findings of state courts in the absence of 'exceptional circumstances'") (citing *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952)); *see also Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact . . . in the absence of a very obvious and exceptional showing of error.'") (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)). Consequently, the *BMW* Court must have been engaging in review as a matter of law.

Similarly, in *TXO*, the Court's extensive discussion about the parties' interest in differing bright-line tests for excessiveness reveals that the Court considered the excessiveness question as a matter of law. *See* 509 U.S. at 453-62. Thus, the Court's jurisprudence demonstrates that the constitutional excessiveness inquiry is a question of law that should be subjected to independent judicial review.

The Court's discussion in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), is particularly instructive regarding the need for independent judicial review of these sorts of questions of law. In *Salve Regina*, the Court addressed the question whether the courts of appeals were required to independently review district courts' determinations of state law. *See id.* at 227. Finding a split among the circuits regarding the appropriate deference owed to a district court's interpretation of state law, the Court decided that independent de novo review was appropriate. *See id.* at 231.

The Court began by noting the following general principle: "*The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.*" *Id.* (emphasis added). The Court then catalogued some of the difficulties caused by affording trial courts more deference than is appropriate. The Court noted that trial judges often preside over fast-paced trials and out of necessity devote much of their time to reviewing evidence and hearing witnesses. *See id.* at 231. As the Court explained, "trial judges often must resolve complicated legal questions without benefit of extended reflection [or] extensive information." *Id.* at 232 (internal quotation omitted; alteration in original). By contrast, courts of appeals are "structurally suited to the collaborative juridical process that promotes decisional accuracy." *Id.*

The *Salve Regina* Court also described the benefits of independent appellate review, many of which apply with

equal force to the question of constitutionally excessive punitive damage awards:

> Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review . . . . Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court . . . . [A]n appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions.

Id. at 232-33. Lastly, the court rejected the notion that deference was owed to the trial court because it might be more familiar with state law. *See id.* at 238-39.

This case reveals two fundamental principles essential to the Court's resolution of the standard of review in punitive damage cases: (1) independent appellate review contributes significantly to meaningful review, and (2) independent appellate review is warranted when the issue before the court requires reflective, analytical, and objective analysis more properly suited to the skills and functional duties of appellate courts.

This Court has long applied independent appellate review of analogous constitutional questions that, like judicial review of excessive punitive awards, involve application of a legal standard to the totality of the circumstances presented. For example, the Court has held that independent appellate review is required with respect to determinations of probable cause and reasonable suspicion under the Fourth Amendment. Like the assessment of constitutional reasonableness for punitive awards, this area of the law is not easily subject to bright-line rules because it "is not possible" to "[a]rticulat[e] precisely" what these standards mean. *Ornelas v. United States*,

517 U.S. 690, 695 (1996). Instead, the decisionmaking process involves application of "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Id.* at 696.

Given these aspects of the legal standards, the *Ornelas* Court concluded that independent appellate review of probable cause and reasonable suspicion was necessary. *Id.* at 697 ("We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination."). The Court explained that the relevant legal rules for probable cause and reasonable suspicion "acquire content only through application." *Id.* Crucial to the development of such rules was independent appellate review: "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.*

Similarly, in *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court considered the question whether "in custody" determinations in the habeas corpus context were questions of law subject to de novo review or questions of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *See id.* at 106-07. The Court ultimately concluded that the "in custody" determination should be reviewed de novo as a question of law. *See id.* at 112. The Court reasoned that two discrete inquiries were essential to the "in custody" decision: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* The court concluded that "[o]nce the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry." *Id.* (in-

ternal quotation omitted). Accordingly, the Court held that independent appellate review was required. *See id.*

Essentially the same considerations compel the conclusion that independent appellate review is required in the punitive damages context. As is true of the "in custody" or "voluntariness" inquiry, an appellate court reviewing an excessiveness claim in a punitive damages case is presented with a trial court record that sets the scene and reconstructs "the players' lines and actions," and the only role of the appellate court is to consider and apply the legal factors identified by the Court in *BMW*, *Honda Motor Co.*, *TXO*, and *Haslip*, to decide whether the award is constitutionally excessive. Thus, the appellate court "must apply an objective test to resolve the ultimate inquiry," *Thompson v. Keohane*, 516 U.S. at 112, and de novo review is therefore appropriate.

The Eleventh Circuit in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), offered a congent and persuasive analysis of this issue in the punitive damages context. The question presented in that case was whether a judicial reduction of a punitive damages award as excessive constituted a violation of the Seventh Amendment. In resolving that question, the court examined the role of a court in reviewing the amount of a punitive damage award and concluded that this role entailed the resolution of a question of law, not one of fact.[2] *See id.* at 1330-31. The court explained: "No one would dispute that the court, not the jury, has the responsibility for determining the constitutional limit. Courts decide questions of law, not juries." *Id.* at 1331. Having determined that the excessiveness inquiry presented a legal question, the Eleventh

[2] The court of appeals did review certain underlying facts involved in the *BMW* analysis for clear error. *See Johansen*, 170 F.3d at 1334.

Circuit then concluded that independent review was required:

> A constitutional reduction . . . is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court and which we review for an abuse of discretion . . . a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.

Id. (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996); *BMW*, 517 U.S. at 585).

As noted in the petition, several other courts of appeals have reached the same conclusion. *See e.g.*, *Conner v. Schrader-Bridgeport International, Inc.*, 227 F.3d 179, 202 (4th Cir. 2000) ("Whether the jury's award was excessive is a question of law, which we review *de novo*."); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219 (10th Cir. 2000) (applying de novo standard of review for punitive damages assessed against company president) (citing *FDIC v. Hamilton*, 122 F.3d 854, 857 (10th Cir. 1997)); *United States v. Big D. Enters., Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999) ("Appellants characterize the award as 'grossly excessive' and claim that it violates their due process rights . . . . We review the district court's conclusions de novo.").[3]

[3] Other courts of appeals have reached the opposite conclusion. *See e.g.*, *Pavon v. Swift Transportation Co.*, 192 F.3d 902, 909 (9th Cir. 1999); *Morse v. Southern Union Co.*, 174 F.3d 917, 926 (8th Cir. 1999); *Lee v. Edwards*, 101 F.3d 805, 808-09 (2d Cir. 1996). State courts are similarly split. *Compare MacCrone v. Edwards Ctr., Inc.*, 980 P.2d 1156, 1165 (Or. Ct. App. 1999) (en banc) (construing *BMW* to require an independent appellate review); *Routh Wreckage Serv., Inc. v. Washington*, 980 S.W.2d 240, 244-45 (Ark. 1998) (applying de novo review) *with Condon Auto Sales & Serv. Inc. v. Crick*, 604 N.W.2d 587, 595 (Iowa

[Footnote continued on next page]

Most of the lower court decisions reaching a contrary conclusion rely to some degree on *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), or *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). *Browning-Ferris* does not compel this conclusion, however, because in that case the Court held that the due process challenge to the allegedly excessive punitive damage award was not properly before the Court. *See Browning-Ferris Indus.*, 492 U.S. at 277. In that case, the petitioner's central contention (which the Court rejected) was that the Eighth Amendment's Excessive Fines Clause applied to constrain awards of punitive damages in private civil suits. *See id.* at 275. The Court's discussion of a deferential standard of review was clearly addressed only to the defendant's motion for a new trial or remititur under FED. R. CIV. P. 59, not to a due process excessiveness challenge. *See id.* at 279. Accordingly, *Browning-Ferris* does not resolve the question of the appropriate standard of review for claims of unconstitutionally excessive punitive damages awards in violation of the Due Process Clause.

Gasperini is equally inapposite, because it addressed only compensatory damages and did not involve any *constitutional* challenge to the size of a damages award. *See Gasperini*, 518 U.S. 415 (assessing the validity of New York statute authorizing appellate review of compensatory damages that deviate materially from reasonable compensation and applying an abuse of discretion standard for use by federal appellate courts). Thus, the clear weight of the relevant caselaw supports the application of an independent review standard for these questions of law.

[Footnote continued from previous page]

1999) (using abuse of discretion standard); *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 413-15 (Ky. 1998) (clear error).

D. Even If The Excessivenss Inquiry Were Not A Question Of Law, Independent Review Would Still Be Required

Even if the Court were to conclude that the assessment of excessive awards is an essentially factual inquiry, independent judicial review would still be necessary as a prophylactic measure to guard against the danger of unconstitutional deprivations. *See Agosto v. INS*, 436 U.S. 748, 753 (1978) (de novo judicial determination required for claims of American citizenship in deportation proceedings); *Turner v. Arkansas*, 407 U.S. 366, 368 (1972) ("Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, and it is a 'matter of constitutional fact (this Court) must decide through an examination of the entire record.'") (citation omitted); *United States v. John J. Felin & Co.*, 334 U.S. 624, 639-40 (1948) (plurality opinion) ("when this Court reviews State court judgments involving constitutional issues it 'must review independently both the legal issues and those factual matters with which they are commingled.'") (citation omitted); *High v. Rhay*, 519 F.2d 109, 114 (9th Cir. 1975) ("Constitutional facts must be reviewed de novo on appeal . . . ."). Adoption of de novo review in this area would be consistent with the approach long followed by this Court in the First Amendment context.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court adopted the "actual malice" standard for public-figure defamation cases, and made clear that independent appellate review of the record is required in defamation cases "to assure . . . [that] a forbidden intrusion on the field of free expression" has not occurred. *Id.* at 285. The Court's rationale for requiring independent appellate review in such cases was not limited to the issue of "actual malice" or the area of First Amendment law. Instead, the Court expressed a considerably broader rationale, describing the independent review requirement as one arising from the Court's duty "in

proper cases . . . to make certain that [constitutional] principles have been constitutionally applied." *Id.* The case before it was "such a case" in the Court's view, "since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *Id.* (citation omitted).

The Court recently reaffirmed the independent review requirement for constitutional facts in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). The Court stated: "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* at 508 n.27. The *Bose* Court characterized the independent review requirement as applying "in cases raising First Amendment issues," noting that in such cases the Court has "repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (citation omitted). The rationale for the independent review requirement rests upon the fundamental obligation of courts to guard zealously the boundary between constitutionally protected and unprotected speech. *See id.* at 505.

If the Court decides that the review of punitive damage awards essentially involves a factual determination, the Court should apply an independent review requirement, because, as in the First Amendment context, searching scrutiny by appellate courts is essential in order to draw the line between constitutional and unconstitutional action. The drawing of this line should be the product of independent appellate review, which creates precedent and uniformity, rather than the result of inevitably conflicting and inconsistent trial court determinations that lack precedential effect and are reviewed only under a deferential standard.

The use of independent appellate review would also be warranted if the Court found the excessiveness determination to involve a mixed question of law and fact. Mixed questions of law and fact exist in situations where the law is clear, the facts undisputed, and a court's task is to assess whether the facts satisfy the legal standard. *See Pullman-Standard*, 456 U.S. at 289 n.19. In general, this Court's precedents support the conclusion that mixed questions of law and fact are reviewed de novo. *See* MOORE'S FEDERAL PRACTICE § 206.04, (3d ed. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)); *see also United States v. John J. Felin & Co.*, 334 U.S. at 639-40 (plurality opinion) ("Where the conclusion is a 'composite of fact and law,' this Court may certainly hold that as a matter of law the findings are erroneous.") (quoting *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 223 U.S. 655, 668 (1912)). Additionally, all of the concerns identified above as warranting independent review of constitutional facts would apply with even greater force to mixed questions of law and fact. Accordingly, this Court should require appellate courts to conduct an independent review regardless of whether the assessment of constitutionally excessive punitive damage awards is a question of law, a question of constitutional fact, or a mixed question of law and fact.

III. The Factors Considered By Courts In Evaluating Constitutionally Excessive Awards Confirm The Need For Independent Review

This Court's decisions regarding punitive damage awards have created a legal framework to be applied by courts in evaluating whether a punitive award is "grossly excessive." *BMW*, 517 U.S. at 568. The nature of this inquiry further militates in favor of independent review. Under *BMW*, courts must look to three "guideposts" in deciding whether a punitive damage award is unconstitutionally excessive. *Id.* at 574. These guideposts are: (1) the "degree of reprehensibility" of the wrongdoing;

(2) "the disparity between the harm or potential harm suffered" by the plaintiff and the award; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 575. Despite the presence of these guideposts, however, the Court has repeatedly resisted invitations to fashion bright line rules, preferring instead to focus on general "reasonableness" concerns when evaluating whether a certain award is "grossly excessive." *TXO*, 509 U.S. at 458. A review of these necessarily flexible factors leads to the inescapable conclusion that appellate courts are best suited to the task of independently evaluating them.

The most important of these guideposts is the first factor. *See BMW*, 517 U.S. at 575. "As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'" *Id.* (quoting *Day v. Woodworth*, 13 How. 363, 371 (1852)). Several underlying concerns should be reviewed by a court: (1) whether the harm was primarily or entirely economic in nature; (2) whether the defendant's conduct displayed a recklessness or indifference to others' health and safety; and (3) whether an injury, if economic in nature, was the result of intentional acts of misconduct or acts targeted to financially vulnerable individuals. *See id.* at 575-76. These are not factors that are unique to the perspective of trial courts. Rather, appellate courts routinely assess, by comparison to other cases and fundamental tenets, the reprehensibility of defendants' conduct. In fact, this Court and other appellate courts around the country have engaged in this type of analysis with regard to punitive damages on numerous occasions without difficulty or objection. The Court has merely evaluated the factors and in the process demonstrated appellate courts' ability, and indeed superior ability, to conduct such analysis.

The nature of the second "guidepost"—the ratio of the harm suffered to the punitive damage award imposed—also supports independent appellate review.

This analysis is often conducted by comparing the compensatory damage award with the punitive damage award. *See id.* at 580-83. However, the test is not "a simple mathematical formula, even one that compares actual and potential damages to the punitive award," because "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Id.* at 582. Although this analysis depends on the factual circumstances of a defendant's misconduct, it also relies significantly on an objective analysis of general reasonableness. *See id.* at 583. This objective analysis is best suited to the capabilities of appellate courts, with their consideration of many varied factual situations and their ability to better promote uniformity and consistency through the development of binding precedent.

The third guidepost, comparison to legislative evaluations of the reprehensibility of the conduct, is also not uniquely within the ability of trial courts. The briefing, argument, and multiple judge format of appellate court decision making enhances the likelihood that an appellate court will correctly determine the amount and type of penalties imposed by legislatures for similar conduct.

Accordingly, the nature of the inquiry required to assess possible due process violations counsels in favor of independent review. Appellate courts are at least as able as trial courts to review these types of considerations, and with regard to some factors, appellate courts are likely to have a distinct advantage. Moreover, the use of independent appellate review would complement the case-by-case approach the Court has adopted in this area and further the objects of due process. The case-by-case analysis properly relies on the expertise of courts in evaluating awards. However, the expertise of courts will not be fully brought to bear on this problem unless appellate courts are required to make their own independent reviews of punitive awards. Allowing appellate

courts to defer to the varied predilections of trial judges across the country may be expedient, but it threatens the effectiveness and uniformity of the excessiveness standard adopted by this Court to implement the Due Process Clause.

IV. The Court's Due Process Jurisprudence Reveals No Special Deference To Trial Courts' Excessiveness Determinations

It is also noteworthy that the Court's decisions addressing punitive damage awards have not indicated in any way that appellate courts should accord trial courts deference in reviewing a punitive damage award. *See BMW*, 517 U.S. 559 (containing little or no discussion of the trial court's ruling on the due process issue and giving no deference to that decision); *TXO*, 509 U.S. 443 (showing no indication of special deference to the trial court's resolution of the due process issue).

In *TXO*, for example, this Court's review of a $10 million dollar punitive damages award upheld by the West Virginia state courts included scant discussion of the trial court's ruling.[4] Instead, this Court actively reviewed the trial record, the conduct of the defendant, and the applicable law. *See TXO*, 509 U.S. at 454-62. This approach parallels the independent-review standard advocated by petitioner in this case. In the penultimate portion of the opinion addressing the validity of the punitive award, the *TXO* Court made no reference to the trial court. Rather, the Court stated that "[o]n the record,

[4] The Court's only significant discussion of the trial court's review was in response to the petitioner's contention that the court had failed to properly articulate its reasons for denying the motion alleging a constitutional violation. Read in context, it is quite apparent that this discussion arose as a result of petitioner's argument and not any underlying deference on the part of the Court.

the jury may reasonably have determined that [petitioner] set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance." *Id.* at 462. The Court then concluded that it was "not persuaded that the award was so 'grossly excessive' as be beyond the power of the State to allow." *Id.* This analysis strongly suggests that the Court was directly reviewing the jury's action, not assessing whether the trial court abused its discretion.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the Court discussed the function of judicial review of punitive awards without making any distinction between trial and appellate judges, stating that after the verdict, "[t]he jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15-16. Moreover, the Court's discussion recognized the value of rigorous appellate review. *See id.* at 21 ("appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose"). Again, the Court's analysis eschewed any deference to the trial court's assessment. Instead, the Court's decision to uphold the award was due to its own thorough review as well as that of the Alabama Supreme Court and the trial court. *See id.* at 23-24. In short, this Court's precedents provide further support for the principle of independent appellate review in this context.

CONCLUSION

The Court should take this opportunity to make clear that nothing short of independent appellate review will sufficiently guarantee defendants' constitutional rights to be free of excessive awards of punitive damages. In order to ensure adequate protection for this important constitutional right, the Nation's appellate courts must scrutinize punitive damage awards with care to make sure they satisfy the requirements of due process. The

judgment of the court of appeals should therefore be vacated, and the case remanded for independent appellate review of the punitive damages award.

Respectfully submitted.

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No. 99-2035

IN THE SUPREME COURT OF THE UNITED STATES

COOPER INDUSTRIES, INC.,
Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CITIZENS FOR A SOUND ECONOMY FOUNDATION, AMERICAN CHEMISTRY COUNCIL, HEALTH INSURANCE ASSOCIATION OF AMERICA, AMERICAN ASSOCIATION OF HEALTH PLANS, AND COALITION FOR ASBESTOS JUSTICE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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No. 99-2035

IN THE SUPREME COURT OF THE UNITED STATES

COOPER INDUSTRIES, INC.,
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LEATHERMAN TOOL GROUP, INC.,
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On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICI CURIAE*

The American Tort Reform Association ("ATRA"), founded in 1986 and based in Washington, D.C., is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.* For over a decade, ATRA has filed

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* Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no persons or entities, other

(continued...)

amicus curiae briefs in cases before this Court that have addressed important liability issues, including punitive damages awards.

The National Association of Manufacturers ("NAM") – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

Citizens for a Sound Economy Foundation ("CSEF") is a nonprofit, non-partisan, grassroots organization devoted to educating the public about the benefits of the free market system and a less intrusive government. CSEF's 250,000 members nationwide are everyday citizens who are concerned that larger and larger punitive damages verdicts are being rendered based on weak burdens of proof, irrelevant and even prejudicial evidence, and often

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than the *amici*, have made a monetary contribution to preparation or submission of this brief.

multiple times against the same defendant for the same activity. CSEF's mission includes efforts to restore predictability and fairness in punitive damages law, so that such awards are not meted out in a "litigation lottery" characterized by excessiveness and arbitrariness.

The American Chemistry Council ("ACC") is a nonprofit trade association whose member companies produce, market, and use industrial chemicals. ACC's member companies comprise more than ninety percent of the productive capacity for basic industrial chemicals in the United States.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is an advocate for the private, market-based health insurance system. Its more than 290 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility and responsiveness.

The American Association of Health Plans ("AAHP") is a national association for the managed health care community. AAHP's membership includes health maintenance organizations (HMOs), preferred provider organizations, third party health benefits administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1000 health plans serving nearly 140 million Americans.

The Coalition for Asbestos Justice, Inc. ("Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the asbestos litigation environment.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioner's statement of the case.

SUMMARY OF ARGUMENT

This Court's jurisprudence has firmly established that punitive damages awards must satisfy the due process requirements of the United States Constitution. Now, the Court must allow federal appellate courts to exercise the exacting type of

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[1] The Coalition for Asbestos Justice includes the following insurers: ACE-USA, Chubb & Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Kemper Insurance Companies, Liberty Mutual Insurance Group, and the St. Paul Fire and Marine Insurance Company.

ensure that those constitutional guarantees are not simply empty platitudes.

In other contexts, federal appellate courts have traditionally conducted an independent review of the record when determining whether constitutional guarantees are violated in individual factual circumstances. This type of review allows for the preservation of a litigant's constitutional rights and encourages reasoned development of constitutional jurisprudence. The same careful review using a *de novo* standard should be required when a federal appellate court considers whether a punitive damages award is "so grossly excessive as to amount to a deprivation of property without due process of law." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (*quoting Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909)). Without such careful review, defendants are subject to the whims of juries or personal predilections of trial courts. Permitting a discretionary standard of review would give trial judges extraordinary latitude in determining whether punitive damages awards are excessive. This latitude will substantially weaken the due process protections established by this Court – or even render them meaningless.

Because the excessive nature of a punitive award violates a defendant's fundamental constitutional rights, a *de novo* standard of review must be used by state appellate courts as well as federal circuits. Indeed, without directly imposing such a standard on the states, this Court already has encouraged state court use of a more exacting review standard. It did so by suggesting that an adequacy of appellate review by state courts is essential to assure that punitive damages awards satisfy procedural due

process. *See Pacific Mutual Insurance Company v. Haslip*, 499 U.S. 1, 18 (1991). Adopting a deferential standard of review for federal appellate courts while promoting a more exacting standard for state appellate courts will result in inconsistent results and encourage forum shopping.

A *de novo* standard of review would further help assure protection of fundamental constitutional rights. Under a discretionary standard, some federal trial judges may feel that they have the liberty to act as they choose with little regard for appellate scrutiny. On the other hand, under a *de novo* standard, trial judges are likely to self-police their decisionmaking on the constitutionality of punitive damages. Not only will this enhance individual litigants' constitutional protections, it will also encourage consistency and predictability in the development and interpretation of precedent regarding the constitutionality of punitive damages awards. In this way, a *de novo* standard will reduce the need for appeals and ultimately send litigants the message that filing lawsuits is not a direct path to a windfall award – thus helping to ensure that punitive damages will no longer "run wild." *Haslip*, 499 U.S. at 18.

ARGUMENT

I. The Standard Of Review Has Been Historically Dependent Upon The Designation Of The Appellate Issue

In the absence of any specific legislative directive, this Court has historically determined the appropriate standard for appellate review through its characterization of the issue on appeal. There have been four primary designations in this regard:

historic fact, law, mixed question of law and fact, and matters of discretion. While the means by which the Court categorizes the individual issue is not always clearly defined, the applicable standard of review is always dependent on the designation given to the individual issue.

Issues of fact determined by a jury are given deferential review in accordance with the Seventh Amendment of the United States Constitution. When determined by a trial court, factual findings are reviewed for clear error. *See* Fed. R. Civ. Pro. 52(a). As this Court explained:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . ."

Townsend v. Sain, 372 U.S. 293, 310 n.6 (1963) (*overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)) (citation omitted). Issues of law, on the other hand, are reviewed *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-33 (1991) (citing 28 U.S.C. § 1291).

Mixed questions of law and fact, like issues of law, have been historically examined through *de novo* review. *See Miller v. Fenton*, 474 U.S. 104, 112 (1985). Such mixed questions arise where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] ... standard, or, to put it another way, whether the rule of law as applied to

> the established facts is or is not violated.

Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (*quoting Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). Deferential review of mixed questions of law and fact may, however, be warranted where "probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Russell*, 499 U.S. at 233. In this situation, a lower court's exercise of discretion is afforded great deference and is reviewable only to determine whether the court abused its discretion. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

II. The Determination That A Punitive Award Is "Grossly Excessive" Under The United States Constitution Is A Mixed Question Of Law And Fact Requiring *De Novo* Review

This Court has repeatedly emphasized that excessive punitive damages awards may violate due process rights guaranteed by the United States Constitution. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19 (1991); *see also TXO.*, 509 U.S. at 454; *cf. Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 59 (1996) (prohibition of judicial review of amount of jury's punitive damages award violates the Due Process Clause of Fourteenth Amendment). Punitive damages are subject to substantive due process protection because, as this Court has previously recognized,

> [e]lementary notions of fairness enshrined in our constitutional jurisprudence dictates that a person

> receive fair notice not only of the conduct that will subject him to punishment, *but also of the severity of the penalty that a State may impose.*

Gore, 517 U.S. at 574 (emphasis added); *see also TXO*, 509 U.S. at 454 (Due Process Clause imposes substantive limits "beyond which penalties may not go"); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) (setting aside penalty imposed on telephone company because it was so "plainly arbitrary and oppressive" as to violate the Due Process Clause). Because of the substantive due process rights involved, *de novo* review is required.

A. Whether A Punitive Damages Award Is "Grossly Excessive" Is A Mixed Question of Law and Fact

The Court's assessment of the constitutionality of a punitive damages award requires a careful balancing of the competing legal interests at stake. On the one hand, the Court has recognized the fundamental due process right of citizens to be free from arbitrary and oppressive government action. *See TXO*, 509 U.S. at 454. On the other hand, governments must be able to fashion damages that are reasonably necessary to vindicate society's legitimate interests in punishment and deterrence. *See Gore*, 517 U.S. at 568. Recognizing this balance, this Court has ruled that "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id. See also id.* at 586 (Breyer, J., concurring) (constitutional determination focuses on whether award is "grossly

excessive" in relation to legitimate punitive damages objectives). Therefore, whether an award is "grossly excessive" becomes the ultimate question to be resolved in determining whether a constitutional violation has occurred.

Balancing the dual interests of the individual and the State requires a two-part process comporting with the test for ascertaining the existence of mixed questions of law and fact as set forth by this Court in *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see also Ornelas*, 517 U.S. at 696. First, the factfinder must determine the "historical facts" of the existence and nature of the defendant's bad acts that give rise to the punitive award. *See Swint*, 456 U.S. at 289 n.19 ("the historical facts are admitted or established..."). Once such underlying factual issues have been resolved, the second step requires that the Court make a legal judgment about those facts. *See id.* ("[T]he issue is whether the facts satisfy the [relevant constitutional] ... standard").

The applicable rule of law for assessing a punitive damages award is undisputed. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court set forth a three-part standard to guide lower courts in determining whether a punitive award is so "grossly excessive" under the circumstances as to violate due process. First, and most importantly, the award must take into account "the degree of reprehensibility of the defendant's conduct." *Id.* at 575. Next, the award must reflect proportionality between the punitive damages award and the actual harm sustained by the plaintiff. *See id.* at 580. Finally, a reviewing court must consider the civil or criminal penalties that could be imposed for comparable misconduct. *See id.* at 583. The

question then becomes whether, under this standard, the facts contained in the record are legally sufficient to support the amount of punitive damages awarded. *See id.* at 585; *see also Ornelas*, 517 U.S. at 696-97.

The process set out by this Court in *Gore* seeks to place historical facts within a legal framework. It is *not* a re-determination of historical facts themselves. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting) ("Unlike the measure of actual damages suffered which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."). Such a mixed question of law and fact requires *de novo* review. *See Ornelas*, 517 U.S. at 696.

B. The Goals Of Preserving Individual Constitutional Rights And Developing A Clear And Consistent Constitutional Punitive Damages Doctrine Mandate *De Novo* Review

De novo review of mixed questions of law and fact by federal appellate courts does not impermissibly invade the province of the jury. *See New York Times v. Sullivan*, 376 U.S. 254, 285 n.26 (1964) (Seventh Amendment does not preclude Court from independently reviewing mixed questions of facts and law). Moreover, this Court has long held that where facts implicate constitutional issues, the federal appellate court may make an "independent" review of the record. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989); *Bose Corp v. Consumers Union of United States*, 466 U.S. 485 (1984) (First Amendment

issues). And similarly, except in cases involving issues of limited precedential value, such as individual juror bias, the Court has consistently accorded *de novo* review to issues which arise as a result of Fourth, Fifth or Sixth Amendment challenges. *See, e.g.*, *Ornelas*, 517 U.S. at 697 (1996) (ultimate determinations of reasonable suspicion and probable cause require independent appellate review); *Thompson v. Keohane*, 516 U.S. 99 (1995) (in Fifth Amendment context, rejecting argument that "in-custody" determination should be accorded a presumption of correctness); *Davis v. North Carolina*, 384 U.S. 737 (1966) (voluntariness of confession); *Brewer v. Williams*, 430 U.S. 387 (1977) (waiver of Sixth Amendment right to counsel).

The reason for *de novo* review in such circumstances is clear. As the Court explained in *Bose*, federal judges have:

> a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact-finding function be performed in the particular case by a jury or by a trial judge.

466 U.S. at 501. This responsibility requires the appellate court "in proper cases, [to] review the evidence to make certain that [constitutional] principles have been constitutionally applied." *New York Times*, 376 U.S. at 285; *see also Norris v. Alabama*, 294 U.S. 587, 590 (1935) (Court's duty is "to inquire not merely whether a [federal constitutional right] was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made.").

The use of a discretionary standard to assess the constitutional limits of punitive damages awards will relegate the adjudication of fundamental constitutional rights to individual trial judges. While the professionalism and dedication of the federal judiciary is unquestioned, the notion of vesting individual judges with such sweeping power is disconcerting:

> One must concede that unlimited jury discretion – *or unlimited judicial discretion for that matter* – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.

Haslip, 499 U.S. at 18 (emphasis added). By contrast, independent *de novo* review creates a full and meaningful system of checks and balances to help preserve individual constitutional rights.

In addition to helping assure that an individual's substantive due process rights are preserved, independent *de novo* review of excessive punitive awards by federal appellate courts is necessary to define the contours of the "grossly excessive" test established in *Gore*. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 279 (1985) (*de novo* review is particularly important where there is a need for development of a constitutional norm); Douglas Harkin, BMW of North America, Inc. v. Gore*: A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damages*, 60 Mont. L. Rev. 367, 390-91 (1999) (discussing need for additional guidance on application of *Gore* standards).

As with other ultimate questions bearing on an individual's federal constitutional rights, the "grossly excessive" principle is a "fluid concept" that takes its substantive content from the particular context in which the standard is being assessed. *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (standards for constitutional determination of reasonable suspicion and probable cause to search cannot be reduced to a neat set of legal rules); *Bose*, 466 U.S. at 506 n.25 (constitutional standards regarding suppression of communications do not readily lend themselves to generalized definitions). Particularly in such situations, where

> the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.

Miller, 474 U.S. at 114; *see also Ornelas*, 517 U.S. at 697 (independent review is "necessary if appellate courts are to maintain control of, and to clarify, legal principles").

The federal circuit courts, as the "expositors of law," are best situated to carry out the "dual goals of doctrinal coherence and economy of judicial administration." *See Russell*, 499 U.S. at 231. They are also uniquely "structurally suited to the collaborative juridical process that promotes decisional accuracy," as they can devote their attention to comprehensively analyzing and

resolving legal issues without concern for developing the record. *Id.* at 232. Finally, since this Court hears only a small fraction of the cases heard by federal appellate courts, the circuit courts are given the primary responsibility of shaping the contours of the constitutional limitations on excessive punitive damages awards. As a result, the circuit courts must have the independence to exercise their responsibilities through use of *de novo* review.

III. State Appellate Courts Are Similarly Required To Adopt A *De Novo* Standard Of Review In Order To Uphold Federal Substantive Due Process Guarantees

As discussed, the Court's determination of the appropriate standard of review for the amount of punitive damages awards has an important constitutional dimension; it is more than an exercise of the Court's supervisory powers over the lower federal courts. *Compare Daubert v. Merrell-Dow Pharmaceutical Co.*, 509 U.S. 579 (1993) (exercising Court's supervisory powers and establishing factors for ascertaining admissibility of scientific evidence in federal courts). Because the excessiveness of a punitive damages award can violate a defendant's due process rights, state appellate courts, as well as federal tribunals, must review this fundamental issue *de novo*.[2] *See Dickerson v. United States*, 120

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[2] When liability is based on state law, judges must assess and review a punitive damage award under both the federal constitutional standards in *Gore* and applicable state guidelines. *See FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) (whether a (continued...)

S. Ct. 2326, 2333 (2000) (with respect to state court proceedings, United States Supreme Court has authority to "enforc[e] the commands of the United States Constitution"); *Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) ("Federal judges may . . . require the observance of . . . special procedures" in state courts "when necessary to assure compliance with the dictates of the Federal Constitution."); *cf. Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no *supervisory authority* over state judicial proceedings. . .") (emphasis added).

Requiring state appellate courts to engage in *de novo* review of trial court rulings on the constitutionality of punitive damages awards under the United States Constitution will preserve constitutional rights and encourage uniform application of the principles enunciated in this Court's punitive damages jurisprudence.

This Court already has ruled that meaningful appellate review of a punitive damages award is a critical part of a constitutionally valid state punitive damages scheme, *see Haslip*, 499 U.S. at 21; *see also Honda*, 512 U.S. at 432. In *Haslip*, the Court upheld Alabama's scheme for awarding punitive damages against a charge that punitive awards in Alabama

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"punitive damage award violates the Federal Constitution is a question separate and apart from Oklahoma state law."). When liability is based solely on federal law, only *Gore* factors apply. *See Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997) (action for employment discrimination under 42 U.S.C. § 1981).

had become the product of "unbridled jury discretion," in violation of the Due Process Clause. The Court ruled that although the jury instructions gave the jury "significant discretion," this discretion was properly constrained by Alabama's requirements for exacting post-verdict and appellate reviews and thus "did not cross the line into the area of constitutional impropriety." *Haslip*, 499 U.S. at 24.

State courts have differed in their understanding and application of *Haslip* and this Court's subsequent punitive damages jurisprudence. Some state courts have consistently interpreted *Haslip* and *Gore* as setting forth a "clear. . . constitutional mandate for meaningful judicial scrutiny of punitive damage awards" at the appellate level. *Honda*, 512 U.S. at 418 (*citing Adams v. Murakami*, 54 Cal. 3d 105, 118 (1991)) (absence of particular evidence frustrates "fully informed" and "meaningful appellate review" of reasonableness of size of award required by *Haslip*); *see Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 857 (Iowa 1994) (*Haslip* requires "substantive" review of punitive award by appeals court); *Schmitz v. Aston*, 3 P.3d 1184, 1205 (Ariz. App. 2000) (*Haslip* requires independent consideration of substantive criteria by appellate court); *MacCrone v. Edwards Center*, 980 P.2d 1156, 1165 (Or. App. 1999) (*Gore* requires appeals court to "make an independent assessment of the jury's award to determine whether it is constitutionally excessive and in violation of Due Process under the [*Gore*] guideposts *without regard to the trial court's reasoning*") (emphasis added).

In *Alexander & Alexander v. B. Dixon Evader & Assoc.*, 596 A.2d 687, 711 (Md. Ct. Spec. App. 1991),

the Maryland Court of Special Appeals relied on *Haslip* when it vacated an excessive punitive damages award as violative of due process. The court rejected Maryland's previous punitive damages rule generally precluding appellate review of the excessiveness of a punitive damages award. The court noted that prior to *Haslip*, Maryland appellate courts could review a trial court's grant or refusal of a remittitur only "under extraordinary circumstances," using an abuse of discretion standard of review. *Alexander & Alexander*, 596 A.2d at 710. But the Maryland court ruled that under *Haslip*:

> [t]he Supreme Court may well have made a wider degree of appellate review than heretofore practiced in Maryland necessary. If faced with a punitive award that was entered upon proper procedure but which nonetheless contravenes due process because it is out of all proportion to both the harm caused and the perniciousness of the conduct, we could not, on the ground of judicial impotence, allow the unconstitutional award to stand.

Id. The Maryland court then proceeded to independently review the punitive damages award.

Moreover, some states have altered their punitive damages schemes to tighten up post-verdict review procedures. *See, e.g., Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991) (announcing substantive factors to be considered in post-trial review of punitive awards); *Crookston v. Fire Ins. Exch.*, 817

P.2d 789, 811 (Utah 1991) (tightening post-trial review standards in order to permit more substantive analysis of factors warranting punitive awards on appeal).

Conversely, other states have decided that such exacting appellate review of a punitive damages award is not necessary under *Haslip*. In such cases, the courts have ruled that an abuse of discretion standard applies and the award will stand if it "is not the result of passion and prejudice. . . ." *Williams v. Aetna Finance Co.*, 700 N.E.2d 859, 871 (Ohio 1998) (deferring to judgment of jury), *cert. denied*, 526 U.S. 1051 (1999); *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108 (Miss. 1992) (despite Court's statements in *Haslip*, Mississippi punitive damages scheme is constitutional where it preserves award unless it "evinces passion, bias and prejudice of the part of the jury so as to shock the conscience") (citation omitted); *see also Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 867 (Miss. 1995) (Supreme Court's statements in *Haslip* regarding constitutionality of Mississippi's punitive damages system were "unwarranted concerns"); *cf. Haslip*, 499 U.S. at 21 n.10 (punitive damages scheme requiring application of detailed substantive standards on review by Alabama Supreme Court "distinguishes Alabama's system from the. . . Mississippi scheme[] about which [the] Justices [have] expressed concern"). A uniform *de novo* standard of review will resolve the uncertainties created by diverse application of this Court's punitive damages law.

Interestingly, it is against this backdrop of post-*Haslip* state court precedent that this Court must consider the standard of review applicable to federal

appellate courts reviewing the constitutionality of a punitive damages award. Federal courts, sitting in diversity, must apply the substantive law of the state on punitive damages, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), but must also abide by federal procedural rules when reviewing the jury verdict. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).[3] As a result, requiring federal courts to use a deferential standard of review while many state courts apply an independent standard of review would create incongruities. *Compare Gamble*, 406 S.E.2d 350 (establishing elaborate post-trial review

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[3] The *Browning-Ferris* Court stated:

> In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.

492 U.S. 257, 279 (1989). While the Court also suggested that such review should be conducted under an abuse of discretion standard, the Court's *Browning-Ferris* opinion predated its determination in *Gore* that "grossly excessive" punitive damages awards may violate substantive due process rights. *Amici* believe, as discussed *supra*, that rulings on the constitutional issue implicated by excessive awards should be reviewed *de novo*.

for South Carolina courts to avoid due process violations) *with Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (noting that while *Gamble's* new South Carolina post-trial review procedures appeared similar to those held constitutional under *Haslip*, "a federal court cannot apply the *Gamble* post-verdict review process, leading to the anomalous result that a decision on a claim for punitive damages could be significantly different depending on whether the case was tried in a federal court."). These incongruities are contrary to the policies behind the *Erie* doctrine. As the Court has stated previously, "the nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction, . . a suit . . . in a federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust v. United States*, 326 U.S. 99, 109 (1945).

The possible post-*Haslip* incongruity between state and federal courts creates significant opportunities for forum-shopping on the part of both plaintiffs and defendants, resulting in wasteful and time-consuming litigation. It also would increase the "notice problems" created by the already well-documented unpredictability of punitive damages awards. *See Gore*, 517 U.S. at 574. This incongruity can – and should – be eliminated through use of the *de novo* standard of review by both state and federal courts considering the constitutionality of punitive damages awards.

IV. *De Novo* Review Will Help Assure The Development Of Clear Legal Standards And Regulate Runaway Punitive Awards

This Court has recognized that punitive damages have "run wild" in the American legal system, jeopardizing fundamental constitutional rights. *Haslip*, 499 U.S. at 18. This is, in part, a result of the free-for-all lottery-like aspect of punitive damages awards. Plaintiffs can "roll the dice" and try their luck with juries, who, with little guidance on assessing punitive awards, often award windfall amounts. This casino-like atmosphere is encouraged by the lack of a clear set of legal principles governing the excessiveness of these awards.

The size of punitive damages awards already vary dramatically from jurisdiction to jurisdiction – even for the same or similar conduct.[4] If the constitutionality of punitive awards is reviewed only for "abuse of discretion," the development of clear precedent to guide future courts in their assessments

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[4] A study of 47 counties in 11 states over a several-year period showed a high degree of variability: Punitive damages were awarded in about 25 percent of the successful verdict cases in some counties and not awarded at all in others. Median verdicts ranged from less than $10,000 in some areas to as much as $204,000 in others. *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 31-32, 42 (1990).

of such damages will be prevented. As this Court noted in another constitutional context:

> [a] policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.

Ornelas, 517 U.S. at 697 (*quoting Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

The resulting lack of clear legal standards will frustrate the twin goals of punitive damages – deterrence and retribution. Absent consistent legal standards on the constitutional excessiveness of punitive damages awards, defendants have little notice of the punishment they are likely to receive under certain circumstances. Arbitrary and inconsistent punishments with little discernible relationship to a defendant's activities provide little incentive for the defendant to change its behavior.

De novo review will allow federal appellate courts to develop clear guidelines for the lower courts as to when a punitive award becomes "grossly excessive." "[A]n appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions." *Russell*, 499 U.S. at 233. Trial courts would thus be required to apply concrete standards in reviewing those decisions. This should ultimately decrease the number of appeals of punitive awards. As a state trial judge wrote:

> If there are clearly defined guidelines on the awarding of punitive damages, the awards of lower courts would more likely be sustained and needless litigation of the amounts of the awards would be reduced.

Douglas Harkin, BMW of North America, Inc. v. Gore: *A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damages*, 60 Mont. L. Rev. 367, 383 (1999).

Most importantly, the consistent application of clear legal standards developed through *de novo* review "helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *See Gore*, 517 U.S. at 587 (Breyer, J., concurring).

CONCLUSION

For the foregoing reasons, *amici* request that this Court mandate a *de novo* standard for appellate review of the excessiveness of punitive damages awards.

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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question: Should an appellate court apply a *de novo* review standard when ruling on a challenge to the constitutionality of a punitive damages award?

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Other Authorities:

David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982) 18-19

Hon. Arthur J. Goldberg, *Can We Afford the Bill of Rights*, 129 MIL. L. REV. 1 (1990) 5

Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983) 15, 16

Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931) 17

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INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.[1]

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including opposing excessive punitive damages awards. WLF appeared as amicus curiae in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and WLF has published numerous articles regarding punitive damages. *See, e.g.*, Arvin Maskin, et al., *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Foundation 1994); Victor E. Schwartz, et al., *Multiple Imposition of Punitive Damages: The Case For Reform* (Washington Legal Foundation Working Paper No. 50, 1992); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation Working Paper No. 50, 1992); Victor E.

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[1] Pursuant to this Court's Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to the preparation and submission of this brief. Counsel of record for both parties have consented to the filing of this brief in letters that have been lodged with the Clerk.

Schwartz, *Punitive Damages: Should the Constitution of the United States Provide Boundaries* (Washington Legal Foundation Legal Backgrounder, 1989); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Foundation Legal Backgrounder 1989). Excessive and unpredictable punitive damages are ultimately harmful to the economy, workers and consumers.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as amicus curiae before the U.S. Supreme Court in numerous cases as co-amicus with WLF, including *BMW of N. Am. Inc. v. Gore* and *Pacific Mut. Life Ins. Co. v. Haslip.*

Amici believe that they can bring a broader perspective on the issues presented in this case which will assist the Court in deciding this case in such a way as to give clearer guidance to courts on the imposition and judicial review of punitive damages awards.

STATEMENT OF THE CASE

Amici curiae are, in the interest of brevity, omitting any detailed statements of the facts of this case. Amici adopt by reference the statement of facts set forth in Petitioner's Brief.

In short, both Petitioner, Cooper Industries, Inc. ("Cooper") and Respondent Leatherman Tool Group, Inc. ("Leatherman") manufacture hand tools. Cooper sought to expand its product line, and develop a multi-function hand

tool, similar to the Pocket Survival Tool (PST) marketed by Leatherman. As it was legally entitled to do, Cooper incorporated many of the unprotectible, functional elements of the PST into its product (ultimately marketed under the name "ToolZall"), to which it added several important modifications.

When the time came for preparing advertisements for the ToolZall, the new product had not yet been physically produced. Thus, a Cooper employee made the decision to use a slightly-modified PST in the advertising photographs, from which uniquely PST features were removed and uniquely ToolZall features added, rendering it visually indistinguishable from the Cooper tool as ultimately produced. Upon seeing the ToolZall advertisements, in which it recognized its own modified product, Respondent brought suit, claiming trade dress infringement under the Lanham Act, unfair competition, false advertising and "passing off." Shortly thereafter, Cooper retracted the advertisements containing the modified PST and voluntarily withdrew its ToolZall from the domestic market.

At trial, the jury found for Respondent on the trade dress claim, although awarded no damages. On the common law unfair competition, "passing off" and false advertising claims, the jury also found for the Respondents and awarded $50,000 in compensatory damages. In addition, the jury assessed $4.5 million in punitive damages against Cooper.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the trade dress infringement verdict, holding that the PST was wholly functional, and therefore did not constitute a protectible trade dress. Although reversing part of the judgment, indicating juror confusion or

misapplication of the law, the Court, under a highly deferential abuse of discretion standard of review, made no adjustment to the punitive damages award.

SUMMARY OF ARGUMENT

Recognizing the extraordinary importance of rights protected by the Federal Constitution, this Court, and appellate courts throughout the Nation, have consistently reviewed allegations of constitutional violations under a *de novo* standard. This heightened standard of review has been deemed essential to provide consistency and predictability, and to ensure that issues of constitutional dimension are analyzed by appellate courts, the expositors of the law, without undue deference to the trier of fact.

On numerous occasions this Court has acknowledged that excessive punitive damages awards violate the Due Process Clause of the Constitution, and has held that meaningful appellate review of punitive damages awards is necessary to comport with Due Process. Accordingly, this Court should find that appellate courts must utilize the same *de novo* standard in reviewing punitive damages awards that may exceed the limits imposed by the Due Process Clause as they use to review other alleged constitutional violations. The sacred rights provided for in the Constitution for all individuals demand no less.

Indeed, only *de novo* review ensures that punitive damages awards will be predictable, fair and consistent, and that the legal issues of constitutional magnitude which they raise are shaped by the court and not the whim of individual juries. Juries are afforded enormous discretion in determining the amount of punitive damages to be awarded and often are given little guidance as to how to

calculate an appropriate punitive damages award. Moreover, they are often not even required to justify their ultimate decision. And, individual jurors often arrive in the courtroom with a personal agenda against wealthy or foreign defendants, or are persuaded to adopt such an agenda by a sympathetic plaintiff. Furthermore, a jury's complete lack of expertise in the structure of corporations, the appropriate amount necessary to punish and deter, and the impact their award may have on the financial viability of a corporation compels the conclusion that their findings not be immune to the careful, principled, independent review of an appellate court, offering predictability, consistency and even-handedness.

ARGUMENT

I. POTENTIAL CONSTITUTIONAL VIOLATIONS HAVE ALWAYS BEEN REVIEWED *DE NOVO*

"The Bill of Rights, contained in the first ten amendments to the Constitution, is every American's guarantee of freedom," Hon. Arthur J. Goldberg, *Can We Afford the Bill of Rights*, 129 MIL. L. REV. 1 (1990) (quoting President H. Truman, *Memoirs* 269 (1956)), a freedom which cannot be diluted by legislatures, courts or the caprice of a jury. Indeed,

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and

> assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Recognizing and safeguarding the fundamental importance of rights enshrined in the Federal Constitution, this Court, and appellate courts throughout the Nation, have consistently reviewed alleged constitutional violations *de novo*. Indeed,

> [t]he requirement of independent appellate review . . . is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. . . . Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . .

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11 (1984).

Thus, in *Bose*, this Court held that *de novo* review of whether speech claimed to be protected by the First Amendment was motivated by actual malice was essential to protect the "precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 511. In *Bose*, petitioner alleged that statements published in respondent's magazine review concerning the quality of sound produced by petitioner's loudspeaker system were false and disparaging. The district court found that petitioner was a public figure, precluding recovery for product

disparagement unless petitioner proved by clear and convincing evidence that respondent's speech was motivated by actual malice. *Id.* at 489-90. The district court found that petitioner had indeed met this burden, and entered judgment in petitioner's favor. *Id.* at 491. On appeal, the United States Court of Appeals for the First Circuit reversed, accepting that the comment about which petitioner complained was false, assuming without deciding that it was a statement of fact rather than unprotectible opinion, but finding, upon *de novo* review, insufficient evidence of actual malice. *Id.* at 491-92. Petitioner objected to the standard of review employed by the Court of Appeals, arguing that an actual malice determination was more akin to a question of fact, meriting review under a clearly erroneous standard. *Id.* at 498-99.

Rejecting Petitioner's objections, this Court painstakingly explained that largely factual issues may cross over into the legal realm, warranting careful, independent appellate review, especially where "the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact." *Id.* at 501. The Court concluded that whether or not actual malice had been established, and thus whether the speech fell within the "majestic protection of the First Amendment," *id.* at 504, was an issue of such import. *See id.* at 508 n.27 ("This Court has an obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments, and in doing so this Court cannot avoid making an independent constitutional judgment on the facts of the case. The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review.") (citations and quotation marks omitted). As a matter of federal constitutional law, minimal restrictions on jury discretion and cursory appellate review are

insufficient to safeguard constitutional rights. *See id.* at 506-07 ("We have therefore rejected the contention that a jury finding. . . is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern."). *See also Peel v. Attorney Registration & Discipline Comm'n*, 496 U.S. 91, 108 (1990) (whether a statement merits First Amendment protection is reviewed *de novo*); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) ("[We] are compelled to examine for ourselves the statements in issue . . . to see whether or not they do carry a threat of clear and present danger . . . or whether they are of a character which the principles of the First Amendment . . . protect."); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991) (constitutional violations are reviewed *de novo*).

Similarly, in *Ornelas v. United States*, 517 U.S. 690 (1996), this Court found that a *de novo* standard of review must be applied in reviewing a probable cause or reasonable suspicion determination in the case of a warrantless search in violation of the Fourth Amendment. In *Ornelas*, petitioners moved to suppress cocaine which police officers found in the car in which petitioners were travelling, on the grounds that the warrantless search of their car was undertaken without probable cause, thus violating their Fourth Amendment rights. Petitioners were initially stopped because their car, an older model two-door General Motors car, was recognized to be a favorite among drug couriers, *id.* at 692, and its license plates were issued in California, a source state for drugs. *Id.* Petitioners consented to a search of the vehicle, during which the police found a loose panel, under which two kilograms of cocaine were found. *Id.* at 693. The district court found that the age and model of the car, with license plates from

a source-state, combined with the fact that petitioners were checking into a motel, in the middle of the night, without reservations, and were both listed in the Narcotics and Dangerous Drugs Information System (NADDIS), provided reasonable suspicion. *Id.* at 694. This suspicion became probable cause when the searching officer discovered a loose panel in the car. *Id.* On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, although reviewing the existence of probable cause under an abuse of discretion standard, rather than the *de novo* standard urged by the government. *Id.* at 694-95.

This Court granted *certiorari* to resolve the appropriate standard of review under which the existence of reasonable suspicion and probable cause should be analyzed, *id.*, concluding that *de novo* review was necessary to determine whether a constitutional violation had occurred. This conclusion was compelled by three rationales.[2] First, the Court noted that *de novo* review provides consistency, whereby similar situations are treated similarly. "A policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Id.* at 697 (citations and internal quotations omitted). Secondly, the Court observed that "the legal rules for probable cause and reasonable suspicion acquire content only through application." *Id.* Permitting too much deference to a factfinder's judgment would, in effect, allow the factfinder

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[2] As discussed in Point II, *infra*, each of these rationales is equally applicable to the determination of whether a punitive damages award is constitutionally excessive.

to mould the law, and "strip a federal appellate court of its primary function as an expositor of law." *Id.* (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Finally, the Court noted that *de novo* review serves to "unify precedent," thus providing predictability in the law. *Id.*

And, this Court's examination of the standard of review applicable to challenges under the Eight Amendment's Excessive Fines Clause in *United States v. Bajakajian*, 524 U.S. 321 (1998), demonstrates why potentially unconstitutional excessive takings, whether in the form of fines or punitive damages, merit heightened scrutiny. In *Bajakajian*, respondent attempted to leave the United States without reporting that he was bringing with him over $350,000 in currency. This reporting violation carried a penalty of forfeiture of the entire amount involved in the offense, in this case, $350,000. After finding that the forfeiture was a fine, within the scope of the Excessive Fines Clause, the Court turned to the question of whether the fine was excessive.

As a threshold matter, the Court emphasized that the amount of the punishment must be "proportional," that is, bear some reasonable relationship to the gravity of the offense that it is designed to punish. *See id.* at 334. The *Bajakajian* Court held that this inquiry must be conducted *de novo*, explicitly rejecting an abuse of discretion standard, because, "the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case." *Id.* at 337. Only a *de novo* standard can assure that the remedy imposed is tailored to the gravity of the offense, avoiding unconstitutionally excessive punishment.

Accordingly, given this Court's teachings and the sacrosanct nature of rights protected by our Constitution, appellate courts throughout the nation have consistently applied a *de novo* standard to review claims of constitutional violations. *See, e.g., Morales v. Immigration & Naturalization Serv.*, 208 F.3d 323, 327 (1st Cir. 2000) (appellate court reviews *de novo* whether an administrative law judge violated party's Due Process rights, denying him a full and fair hearing); *United States v. Jackson*, 181 F.3d 740, 743 (6th Cir. 1999) (constitutional challenges to criminal sentences are questions of law, to be reviewed *de novo*); *Andriasian v. Immigration & Naturalization Serv.*, 180 F.3d 1033, 1040 (9th Cir. 1999) (claims of due process violations in immigration proceedings are reviewed *de novo*); *Tapia v. Roe*, 189 F.3d 1052, 1056 (9th Cir. 1999) (reviewing *de novo* whether a jury instruction violates due process by creating an unconstitutional presumption or inference); *Horstkoetter v. Dep't of Public Safety*, 159 F.3d 1265, 1270 (10th Cir. 1998) (appellate court has an obligation to make an independent examination of entire record in First Amendment cases, to ensure that there has been no unconstitutional intrusion into the constitutionally protected realm of free speech); *United States v. Vahovick*, 160 F.3d 395, 398 (7th Cir. 1998) (reviewing constitutionality of application of sentencing guidelines *de novo*); *United States v. Hamilton*, 128 F.3d 996, 999 (6th Cir. 1997) (reviewing *de novo* whether evidentiary ruling violated defendant's Sixth Amendment right to cross-examine adverse witnesses); *United States v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995) (reviewing *de novo* claims that Sixth Amendment right to public trial was violated); *United States v. Hardy*, 37 F.3d 753, 756 (1st Cir. 1994) (using *de novo* standard of review to determine whether prosecutor's veiled reference to defendant's failure to testify violated defendant's Fifth Amendment rights).

II. PUNITIVE DAMAGE AWARDS THAT MAY EXCEED THE LIMITS IMPOSED BY THE DUE PROCESS CLAUSE IMPLICATE FUNDAMENTAL CONSTITUTIONAL RIGHTS AND SHOULD BE SUBJECT TO *DE NOVO* REVIEW

A. This Court Has Already Found That An Excessive Punitive Damage Award Will Violate The Limits Imposed By The Due Process Clause

In the recent decisions of this Court regarding punitive damages, "a majority of the Justices agreed that the Due Process Clause imposes a limit on punitive damages awards." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994). *See also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'") (citations omitted); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) ("Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process . . . .").

Thus, because excessive punitive damages awards may run afoul of the limits imposed by the Due Process Clause, review of the propriety of such awards deserves no less conscientious, principled a review as is routinely afforded to other alleged constitutional violations. *See supra,* Point I. Therefore, allegations of unconstitutionally excessive punitive damages awards should be reviewed under a *de novo* standard of review. Were this Court to hold

otherwise, it would cast Due Process challenges to excessive punitive damages awards adrift, leaving them an inexplicable anomaly in constitutional law.

B. *De Novo* Appellate Review Is Necessary Given The Wide Latitude Afforded Juries In Assessing Punitive Damages

The rationales favoring *de novo* review, namely consistency, unification of precedent and vesting in the court the primary responsibility for shaping the law, apply with equal force to review of punitive damage awards. A less exacting standard of review permits the size of a punitive damages award to turn on the whim of an individual jury, especially troublesome in light of the vast discretion juries are afforded in assessing punitive damages awards. Requiring *de novo* review allows an appellate court to conduct a meaningful review of an award, strive to ascertain whether the award is reasonable and consistent with penalties imposed for similar conduct by other defendants and in other jurisdictions, and modify anomalous awards. Over time, a standard of reasonable punitive damages, and a set of factors appropriate and inappropriate to consider in determining the amount of the award, will emerge. These controls will further the important goal of unifying the law of punitive damages, providing defendants fair notice of the potential consequences of their action, and juries and lower courts with guidance on this important issue. Finally, only a *de novo* standard of review will ensure that it is the courts which are ultimately charting the contours of Due Process.

1. A *De Novo* Review Of A Potentially Excessive Punitive Damages Award Will Provide The Meaningful Review Required By The Due Process Clause

Judicial review under any standard other than *de novo* simply fails to provide the conscientious, meaningful review that this Court has found, and should reaffirm, to be necessary to comport with Due Process.[3] In the first instance, the factfinder assessing a punitive damages award is afforded such vast, unbridled discretion, that an abuse of that discretion is almost impossible. *See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) ("Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left to themselves in making this important, and potentially devastating, decision."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."). Often, jurors are not instructed in detail as to the factors to

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[3] *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (holding that prohibition of judicial review of punitive damages awards violated Due Process); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (cautioning that "unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities," *Haslip*, 419 U.S. at 18, but finding that Due Process was not offended where petitioner had been afforded a "full panoply" of procedural protections, *id.* at 23, such that a "sufficiently definite and meaningful constraint," *id.* at 22, had been imposed on the factfinder's judgment).

consider in punitive damages analysis, or how those factors should be weighed. *See* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 285 (1983). Nor is the typical juror reminded that compensatory damages also provide a means of deterrence and retribution. *See id.* Rather, as Justice O'Connor noted in *Haslip*, a fairly standard jury instruction "suggests that the jury may do whatever it 'feels' like" with respect to punitive damages awards. *Haslip*, 499 U.S. at 44. Moreover, jurors are not required to explain how they arrived at the amount of the penalty they have chosen to impose upon a defendant. Thus, with the exception of the most egregious verdicts, there will be no concrete proof that discretion was abused and due process compromised. Only the gnawing suspicion of the reviewing court may suggest that an injustice has been perpetrated, an injustice which may never be rectified if the appellate court is limited by a deferential standard of review.

These fears become more acute in cases such as the instant case, where the verdict on one of multiple claims supporting an undifferentiated punitive damages was reversed on appeal. Because the jury is not required to explain what factors or claims motivated their punitive damages award, the reviewing court is unable to ascertain whether or to what degree the erroneously decided claim impacted the punitive damages amount. Allowing such a punitive damages claim to stand where the verdict which may have supported it falls sends a message to reviewing courts that, when confronted with a legal wrong, their power to correct it may be limited.

2. Because Jurors May Be Motivated By Improper Factors In Assessing Punitive Damages Awards, *De Novo* Review Is Merited

The very nature of punitive damages awards suggests that their award may be fraught with prejudice and unsavory motives, necessitating stringent, meaningful, appellate review to ensure that such improper factors do not infect the final verdict. As one commentator has cogently explained, conflicting tensions are inherent in the punitive damages process:

> Another inconsistency arises when the court first instructs that punitive damages cannot be awarded unless the jury finds the defendant's conduct outrageous, but then instructs that the size of the punitive damages award cannot reflect the jury's passion or prejudice. This pairing of instructions assumes that the same jurors can be outraged when awarding punitive damages, but dispassionate when setting the amount. . . . [T]he assumption that jurors can dispassionately find conduct to be outrageous seems rather unrealistic.

Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 287 (1983).

Furthermore, the emotional arguments exhorting the jury to award punitive damages awards more often than not play upon such juror passion and prejudice, frequently focusing on defendant's foreign status and wealth. In *Oberg*, for example, jurors were reminded that the defendant manufacturer, against whom punitive damages were sought, was a Japanese corporation, while plaintiff was

"a red-blooded 20 year-old American boy." *See* Brief of Amici Curiae of Product Liability Advisory Council, *et al.*, No. 93-644, 1993 U.S. Briefs 644 at 9-10. The nationalities of parties would seem to be entirely irrelevant to the decision at hand, their mention by plaintiff's counsel surely serving only to illicitly encourage the jury to redistribute wealth which was not theirs to redistribute, to "one of their own." Similarly, in *TXO*, Justice O'Connor expressed concern over the "near certainty" of prejudice resulting from closing arguments dwelling on defendant's out-of-state status and wealth. 509 U.S. at 493 (quoting plaintiff's counsel's depiction of the defendant as "Texas high rollers, wildcatters" and a "greedy bunch from down in Texas").

Like out-of-state status, the wealth of a corporate defendant can also inflame the passions of a jury, and breathe life into their Robin Hood longings. *See id.* at 492 (citing Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931) ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare.")). Indeed, the enormous bias jurors may harbor towards corporate defendants was vividly portrayed in a recent poll of potential jurors nationwide conducted by the National Law Journal. Van Voris, *Poll: Jurors Give Business Little Respect*, NEW YORK L.J. (Nov. 20, 2000). Of 1000 people polled, 76% agreed (43% strongly and 33% somewhat) with the statement that "Executives of big companies often try to cover up the harm they do." *Id.* Many respondents stated that they could not be impartial in cases involving particular classes of defendants. The percentage of potential jurors biased against defendants ranged from 24% against tire manufacturers, 26% against hospitals, 29% against breast implant manufacturers, 31% against gun manufacturers, 32% against asbestos manufacturers, and 34% against

tobacco companies. *Id.* The fact that such a large percentage of the jury pool is biased, even before hearing a case, against big business counsels against heightened deference to awards they impose. More alarmingly, 30% of respondents believed that to send "an effective message" to a company the damages award must be in the *billions*. *Id.* Such mammoth figures, incomprehensible to most people, highlight the urgency of a meaningful, fair procedure to ensure that corporations are not driven out of business, and prices of products are not driven out of reach of the average consumer, because of the costs of astronomical punitive damages awards.

3. Assessment Of The Amount Of The Punitive Damages Award Is Not Within The Specialized Province Of The Jury, Thus Deference To A Jury's Award Is Not Merited

In all likelihood, a lay jury has little or no experience in corporate structure, no knowledge of the effects that their decision may have on the financial viability of a corporation or the availability of worthwhile products in the marketplace, and no training in the amorphous field of appropriate punishment and deterrence. The assessment of corporate wealth, even apart from an inquiry as to what percentage of that wealth represents an appropriate punishment, is complex. As one commentator has explained:

> Because the defendant's wealth is a relevant factor in determining the amount of punitive damages, one must inquire what "wealth" really means in the case of a manufacturing entity. Basic financial sheet data

> such as sales, profits, and net worth most often have been regarded as the relevant indicators of a corporation's "wealth." Yet figures on a company's sales are often largely unrelated to a company's true financial prosperity, for very little of the gross earnings remains – even when times are good – after deducting the costs of materials, labor, sales administration, taxes, and increasingly, the cost of capital. Even profits after taxes are plainly not idle wealth, because the enterprise will fail if the owners do not receive a fair return on their investment. And even after the payment of dividends, although such retained "profits" may travel to the balance sheet adding to net worth, the remaining dollars hardly represent a pot of idle gold, ripe for plucking by the plaintiff and his lawyer, for usually they will be reinvested in plant, equipment, salaries and other future cost of operation – "the costs of staying in business."

David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 19-20 (1982) (footnotes omitted).

Thus, while great deference is rightly paid to jury's credibility determinations and findings of fact, in recognition of the truth that the jury observed the witnesses and pieced together real-life events, gaining knowledge of the case inaccessible to an appellate court faced with merely a paper record, jurors do not possess any special skill in assessing damages worthy of the deference some courts accord their findings. Rather, upon finding that punitive damages are warranted, the amount awarded seems likely to be influenced largely by the percentage of profits or number of days of sales that plaintiff counsel arbitrarily exhorts the jury to redistribute from defendant to plaintiff. Thus, the

rationale for hesitancy in displacing a jury's judgment with that of a reviewing court is simply inapplicable in the punitive damages context.

4. A *De Novo* Review Will Ensure Consistency, Predictability And Even-Handedness In The Award Of Punitive Damages

In rendering its decisions on punitive damages awards, this Court has declined to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Haslip*, 499 U.S. at 18. Such rejection of a mechanical formula is justified, as no abstraction can take into account the many intricacies shaping a punitive damages award, such as reprehensibility of defendant's conduct, likelihood that conduct will be repeated, and punishment already incurred and likely to be incurred. Nevertheless, this Court has recognized that ensuring that the amount of the punitive damages award is reasonable and rational is a worthy goal. *See, e.g.*, *Oberg*, 512 U.S. at 429. Thus, in *Oberg*, this Court rejected Oregon's argument that the state's power to overturn an award in cases with insufficient evidence to support an award of punitive damages was sufficient to allay Due Process concerns. *Id.* ("This argument is unconvincing, because the review provided by Oregon courts ensures only that there is evidence to support some punitive damages, not that there is evidence to support the amount actually awarded. While Oregon's judicial review ensures that punitive damages are not awarded against defendants entirely innocent of conduct warranting exemplary damages, Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages

are not subjected to arbitrary amounts."). *See also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The sanction in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question of whether a lesser deterrent would have adequately protected the interests of . . . consumers.").

Although no jury or court will consistently arrive at the one magic number which reflects an ideal punishment for a particular defendant in a particular situation, the difficulty of determining an appropriate punishment with precision should not lead courts to abandon that quest. Under an abuse of discretion standard, widely varying punitive damages awards for similar conduct may be imposed, and allowed to let stand, where the only rationale for the different amounts awarded is that different juries determined the punishment. Freeing the reviewing court from the strictures of overly deferential review allows the court to view an award in light of awards that have been ordered against similarly situated defendants for similar conduct and ensures that it is the court, and not the jury, which provides the ultimate interpretation of the Due Process Clause. This provides the essential elements of predictability and consistency among punitive damages awards, and in the process, instills a greater sense of respect for the method by which those penalties are imposed. *See Ornelas*, 517 U.S. at 697.

Indeed, this Court has recognized that only *de novo* review can provide the required consistency and proportionality of whether a monetary fine is excessive. In *Bajakajian*, the Court held that, to avoid constitutional

infirmity, a fine must bear a reasonable relationship to the severity of the underlying criminal offense. Whether the penalty is proportional to the offense is to be reviewed *de novo*. *Bajakajian*, 524 U.S. at 338. This reasonable relationship standard which guided the Court in *Bajakajian* has likewise been applied in the context of assessing whether a punitive damages award is excessive. *See Haslip*, 499 U.S. at 18, *TXO*, 509 U.S. at 459. Under an abuse of discretion standard, a court must give its blessing to widely varying punitive damages amounts, imposed for similar conduct, violating the spirit of proportionality so important to the *Bajakajian* Court. Such a superficial review of the figure selected by a jury, with little knowledge of economic realities, the amounts imposed on the defendant in the past or likely to be imposed in the future, and the amounts imposed in other jurisdictions for similar conduct, simply announces that we have abdicated efforts to ensure that a fair, proportional punishment, no more than is reasonable, be imposed upon a defendant.

CONCLUSION

This Court has acknowledged a deeply held conviction that "judges–and particularly Members of this Court – must exercise. . . [independent] review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984). This Court should similarly hold that Due Process concerns raised by excessive punitive damages awards are no less weighty than other alleged constitutional violations, and empower and require appellate courts to review punitive damages awards *de novo*.

Respectfully submitted.

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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN LEADING BUSINESS CORPORATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CONSENT OF THE PARTIES

Petitioner and respondent have consented to the filing of this brief. Respondent has filed with the Clerk a general consent to all briefs *amicus curiae*. Petitioner's letter of consent is being filed separately herewith.[1]

INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae*[2] are leading manufacturing, energy, transportation, retail, pharmaceutical and financial services companies engaged in commerce throughout the United States and the world. In this era of expansive tort litigation against corporations and even entire industries, *amici* have all defended against lawsuits seeking millions and even billions of dollars in jury-imposed punitive damages. Much of this litigation takes place in federal courts exercising diversity or federal question jurisdiction. This Court's answer to the question under review – "What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?" – will thus implicate *amici*'s interests both directly and vitally.

SUMMARY OF ARGUMENT

Amici believe that to be meaningful and effective, appellate review of a trial court's ruling on the constitutionality of

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[1] No counsel for any party drafted this brief in whole or in part, and no persons or entities other than *amici curiae* made any monetary contribution to its preparation or submission.

[2] American Home Products Corp., Ashland Inc., Caterpillar, Inc., Chevron Corporation, Connecticut General Life Insurance Co., Corning Incorporated, CSX Corporation, CSX Transportation, Inc., E. I. du Pont de Nemours & Co., Eastman Chemical Company, Exxon Mobil Corporation, General Motors Corp., The Goodyear Tire & Rubber Company, Halliburton Co., Johnson & Johnson, Kmart Corporation, Merck & Co., Inc., Minnesota Mining & Mfg. Co., New York Life Insurance Co., Pfizer Inc., PPG Industries, Inc., Reliant Energy, Inc., Shell Oil Company.

jury-imposed punitive damages must be non-deferential. New and important scientific research on punitive damages decisionmaking strongly reinforces this conclusion. In particular, recent empirical studies by leading scholars in the fields of law, economics and cognitive psychology – which collectively report on the deliberations of over 8000 mock jurors and 600 mock juries in controlled experiments designed to investigate the way juries determine punitive damages – show that even conscientious and well-intentioned juries produce systematically erratic and unpredictable awards.

The results of this newly published research are both striking and sobering. Among the major findings:

- While jurors show remarkable consistency in ranking the "outrageousness" of wrongful conduct on a bounded scale (*e.g.*, a scale of one to ten), their translation of such rankings into dollar punitive awards is enormously variable and unpredictable.
- Contrary to commonly-held belief, deliberation by groups of jurors does not moderate the unpredictability of punitive awards, but exacerbates such unpredictability, with deliberating juries returning consistently higher and more variable awards than jurors individually.
- Juries assessing punitive damages will not and cannot apply standard economic deterrence theories, even when specifically instructed on how to do so.
- Juries assessing punitive damages impose significantly varying awards in response to inappropriate factors, including the amount requested in argument by plaintiffs' counsel and bias in favor of local plaintiffs.

- Juries assessing punitive damages exhibit both hindsight bias and irrational attitudes towards risk, for example awarding higher punitive damages against defendants who conduct cost/benefit analyses than against those who do not.

Importantly, these findings do not imply that jurors on the whole are not conscientious, intelligent, or properly motivated. Rather, they show that in the context of punitive damage decisions, juries return erratic and unpredictable dollar awards because of natural features of human cognition. Juries assessing punitive damages as one-time decisionmakers in isolated cases have no ready frame of reference for translating a desire to punish blameworthy conduct into dollar punishment. As a consequence, different juries will assess widely divergent dollar punishment for identical conduct against identical defendants in identical cases. And such decisions are distinctively susceptible to a variety of common cognitive biases, all of which the behavioral literature has observed in other decisionmaking contexts. Perhaps these points should come as no surprise. But whether surprising or not, the inescapable conclusion of this growing body of scientific literature is that dollar awards imposed by juries in isolated punitive damage cases do not reflect – and cannot be expected to reflect – commonly shared values or objectives about either retribution or deterrence. Rather, the studies show, dollar awards are essentially arbitrary.

These findings have important implications for the question under review in this case. They confirm beyond dispute the critical importance of judicial review of jury-imposed punitive damage awards, a fundamental procedural safeguard emphasized in both *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). More importantly, the findings make plain that vindication of the core due process concerns elaborated

in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) – fair notice of potential punishment and evenhanded treatment of similarly situated parties – will turn as a practical matter on the extent to which reviewing courts apply the *BMW* "guideposts" for constitutional review of punitive damages in consistent and predictable fashion.

All of this counsels for adoption of a non-deferential standard of appellate review. The *BMW* guideposts call for independent judicial analysis of the constitutionality of punitive damage awards in light of the reprehensibility of the defendant's misconduct in relation to other types of misconduct, the reasonableness of the size of the award in relation to the compensatory damages, and the reasonableness of the size of the award in relation to other potential civil or criminal sanctions. 517 U.S. at 574-86. As *BMW* itself illustrates, the jury's dollar award is only the starting point of the evaluation. Much of the analysis turns on factors not before the jury at all. While federal district courts are certainly competent to undertake such analysis in the first instance, consistency and predictability of their ultimate conclusions regarding the magnitude of permissible punishment – the very due process interest *BMW* seeks to protect – will come only with the development of a body of appellate precedents enabling consistent application of the *BMW* guideposts at the trial court level. That in turn requires non-deferential appellate review of trial court constitutional determinations.

Amici do not in this brief advocate any particular doctrinal formulation of the standard of appellate review. Our point is simply that a non-deferential standard – however the Court may choose to articulate it – is necessary to bring about consistency and predictability in punitive awards. Just as we cannot expect juries to achieve such consistency and predictability on their own, we cannot reasonably expect trial courts to achieve consistency and predictability in enforcing due process limits without a meaningful body of appellate

precedents to guide their interpretation and application of the *BMW* guideposts.

ARGUMENT

I. JURY-DETERMINED PUNITIVE DAMAGES ARE INHERENTLY ERRATIC AND UNPREDICTABLE

The observation that punitive damages are erratic and unpredictable is not new. Each passing year brings reports of jury-imposed punitive awards of staggering proportions. In 1999, for example, a California jury returned a $4.8 billion punitive damage verdict against General Motors in a personal injury case. Other juries assessed punitive damages ranging from $20 million to more than $200 million in at least a dozen additional cases. *Developments in the Law – The Paths of Civil Litigation*, 113 Harv. L. Rev. 1752, 1783 (2000).

In the face of such reports, defenders of punitive damages are quick to point out that trial and appellate courts frequently reverse or reduce such awards.[3] Available survey evidence suggests this may well be so, at least in the aggregate. A 1986 sampling of federal product liability cases by Professor William Landes and Judge Richard Posner reported that federal appellate courts reversed or sharply reduced the awards in nine of thirteen cases in which punitive damages were appealed, a reversal rate (seventy percent) more than double the reversal rate for plaintiff verdicts not

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[3] *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15, 40-44 (1998); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1115 (1996). Notably, the trial court in the General Motors case referenced above declined to reduce the punitive damages below $1.09 billion, a still grossly excessive amount now subject to review only on appeal. *See* Margaret Cronin Fisk, *The Biggest Jury Verdict of 1999*, National Law Journal, Feb. 28, 2000, at A1.

including punitive damages.[4] Surveys by the Rand Corporation (1987) and the General Accounting Office (1989) likewise reported high rates of reversal or reduction, especially among larger awards.[5] And a 1993 Washington Legal Foundation study of decisions reported on LEXIS and WESTLAW found that fifty-four percent of jury punitive damage awards were reversed, reduced or modified.[6]

These surveys highlight the critical extent to which the tort system relies on judicial review by both trial and appellate courts to counteract erratic and unpredictable punitive assessments by juries. *See Honda*, 512 U.S. at 433 n.11 (survey evidence of this type "supports the importance of judicial review of the size of punitive damages awards"). The high rate of disagreement between judges and juries on punitive damages stands in sharp contrast to the much lower rates of disagreement (typically around twenty percent) reported in the literature on jury verdicts generally.[7] The survey data thus reinforce the need for non-deferential review of punitive damage awards at both the trial and appellate levels.

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[4] *See* William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, Reg. 33 (Sept.-Oct. 1986).

[5] *See* Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings*, Report No. 3311-ICJ, Institute for Civil Justice (Rand Corporation 1987); U.S. General Accounting Office, *Product Liability Verdicts and Case Resolutions in Five States*, GAO/HRD-89-90 (Sept. 1989).

[6] *See* Brief of the Washington Legal Foundation as *Amicus Curiae* in support of petitioner in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

[7] *See, e.g.*, Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883 (1993); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124 (1992).

A. Even When Jurors Can Agree on the Relative Blameworthiness of a Defendant's Conduct, Monetary Awards Are Arbitrary and Unpredictable.

Recent empirical studies on punitive damages decisionmaking confirm what the survey data show. Published in leading law reviews and peer-reviewed behavioral science journals, these studies shed new and important light on *how* juries go about setting punitive damage amounts. Designed and conducted by preeminent scholars in the fields of behavioral analysis of law (Professor Cass R. Sunstein of the University of Chicago), cognitive psychology (Professors Daniel Kahneman of Princeton University, David A. Schkade of the University of Texas, and John W. Payne of Duke University), jury decisionmaking (Professor Reid Hastie of the University of Colorado), and behavioral economics (Professor W. Kip Viscusi of Harvard University), the studies report the results of large scale mock jury simulations involving, in total, over 8000 mock jurors and 600 mock juries.[8] In controlled experiments designed to simulate actual punitive damages decisionmaking, the researchers evaluated the quality and coherence of the jurors' decisionmaking processes.

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[8] As disclosed in the various published studies, *amicus curiae* Exxon Mobil Corporation provided some of the funding for these mock jury simulations. There was, however, no control over the research or its conclusions. As Professor Sunstein states in his preface to a forthcoming book collecting summaries of the various studies in one volume:

> [The authors] are especially grateful for the respect shown, at each and every stage, for the complete independence of the academic enterprise. The data here, as well as the opinions we have expressed, are the property of the authors, and those who helped fund the research exercised no control, explicit or implicit, over its contents.

Cass R. Sunstein, et al., *Punitive Damages: How Juries Decide* (Univ. of Chicago Press, forthcoming 2001).

Their conclusions: given the open-ended nature of the punishment-setting task and natural features of human cognition that influence most jurors' approaches to it, even the most conscientious and well-intentioned juries will produce erratic and unpredictable dollar awards.

The starting point of the analysis is a pair of groundbreaking studies by Professors Sunstein, Kahneman and Schkade evaluating whether different juries presented with identical punitive damage scenarios would assess comparable dollar punishments. In the first study,[9] the researchers provided 899 jury-eligible citizens with scenarios describing ten personal injury scenarios of varying degrees of reprehensibility. They asked the mock jurors to rank the scenarios on a bounded scale of one to six, by both degree of outrageousness (*i.e.*, a scale of 0 = "not at all outrageous" to 6 = "absolutely outrageous") and severity of punishment that should be imposed (*i.e.*, a scale of 0 = "no punishment" to 6 = "extremely severe punishment"), and then to specify the dollar punishment the defendant should have to pay.[10]

The results were striking in several respects. Jurors showed remarkable consistency – cutting across differences in gender, race, age and education – in ranking on bounded scales both the comparative outrageousness of misconduct

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[9] Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998) ("*Assessing Punitive Damages*"). A technical version of the same study, with more detailed statistical analysis, is reported in Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. Risk & Uncertainty 49 (1998).

[10] As part of each scenario, the mock jurors were also provided information about the compensatory damages (in all cases $200,000) and the size of the defendant, and were given standard jury instructions explaining the punitive and deterrent purposes of punitive damages. *See Assessing Punitive Damages*, 107 Yale L.J. at 2146-47.

and the relative severity of punishment they believed should be imposed. The researchers conclude from this finding that moral judgments about misconduct (at least in the personal injury field) are widely shared.[11] But when it came to translating those shared moral judgments into dollar punitive awards, the consensus broke down. Dollar awards for identical scenarios involving identical harm and identical defendants were enormously variable and unpredictable. *See Assessing Punitive Damages*, 107 Yale L.J. at 2100-2103.[12]

The researchers classify this inability to translate shared outrage into consistent dollar awards as an instance of the commonly observed cognitive problem of "magnitude scal-

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[11] This is not to say that jurors perform well in determining whether conduct they would rank as blameworthy passes the *legal* threshold for punitive damages. The results of another large scale mock jury study conducted by Professors Hastie, Schkade and Payne show that at least in the area of non-intentional torts – where the law generally allows punitive damages for negligent conduct only if it rises to the level of "recklessness" – jurors had great difficulty deciding the liability issues correctly. Professor Hastie and his colleagues asked over 120 randomly-selected mock juries to decide liability for punitive damages in case scenarios drawn from decisions in which appellate courts had held that as a matter of law the facts did not show the recklessness that would permit a punitive damages award. Over sixty-seven percent of the mock juries nevertheless would have awarded punitive damages on the very same facts. *See* Reid Hastie, David A. Schkade & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 Law & Hum. Behav. 287 (1998). Juries showed poor comprehension of jury instructions carefully delineating the legally-established recklessness/negligence distinction and substituted their own (incorrect) intuitions instead. *Id.*

[12] The researchers also found (as real-world experience confirms) that jurors returned significantly higher dollar punitive awards against larger companies than they did against smaller ones. *See Assessing Punitive Damages*, 107 Yale L.J. at 2105. Their more important finding, however, was that different jurors made enormously variable punitive damages awards against the *same* defendants, regardless of size, in the *same* cases.

ing without a modulus." *Id.* at 2106-07. In substance, jurors lack a reference point (or "modulus") that would enable them coherently to map commonly shared moral judgments about outrageousness and appropriate severity of punishment onto an unbounded dollar scale. Erratic and unpredictable dollar awards naturally follow.

A follow-on study by Sunstein, Kahneman and Schkade carried the same experiment forward to deliberating juries.[13] Instead of asking 899 mock jurors to rank scenarios and assign dollar punitive awards individually, this study asked approximately 3000 mock jurors to perform the task first individually and then as members of approximately 500 deliberating juries. The researchers hoped to determine whether the process of jury deliberation would moderate the variability of dollar punitive awards determined by jurors individually.

This second study produced results even more striking than the first. The results for individual jurors replicated (and thereby validated) the earlier results. Contrary to commonly-held expectations, however, the process of jury deliberation did not moderate the problem of variable dollar punitive awards, but significantly *exacerbated* it. Deliberating juries produced dollar awards significantly *higher* than the awards that their members would have imposed individually, especially at the high end. The deliberative process thus produced a "severity shift" that substantially increased both the magnitude and the unpredictability of dollar punitive awards. *Deliberating About Dollars*, 100 Colum. L. Rev. at 1155-60. The researchers hypothesize that this severity shift comes about because arguing in deliberations for higher dollar awards (on an unbounded scale) is inherently easier than arguing for lower awards (constrained at zero). *Id.* at 1160-

[13] David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139 (2000) ("*Deliberating About Dollars*").

62. Whatever the cause, however, the data make plain that deliberation makes the problem of erratic and unpredictable punitive damage awards worse, not better.[14]

The results of these two studies have many important implications on many levels, but one point deserves emphasis. The results clearly show the fallacy of claims by retributive theorists that dollar punitive awards meaningfully quantify "community outrage" against corporate misconduct.[15] Juries might accurately convey community outrage if asked to rank the outrageousness of misconduct on a bounded scale, but since they cannot translate such shared outrage into predictable dollar awards, their dollar awards cannot reliably measure community sentiment. *See Assessing Punitive Damages*, 107 Yale L.J. at 2105-06.

B. Jury Awards Do Not, and Cannot, Reflect Any Coherent Theory of Deterrence.

The core justification for punitive damages has always

[14] The results of this study, and the earlier study, also show the fallacy of a recent contention, ostensibly based on regression analysis of the logarithms of compensatory and punitive damage awards made in decided cases, that punitive damages are reasonably predictable based on the amount of compensatory damages awarded. *See* Theodore Eisenberg, et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623 (1997). The experimental data show overwhelmingly that dollar punitive awards vary widely even in identical cases involving identical harms. And when punitive awards are measured in real dollars rather than logarithmic dollars, similarly wide variations appear in real-world cases involving similar conduct and similar harms. *Deliberating About Dollars*, 100 Colum. L. Rev. at 1146 n.31. *See also* A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. Legal Stud. 663, 671-74 (1997); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 Geo. L.J. 381, 384-87 (1998).

[15] *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393 (1993).

been the need to deter blameworthy conduct. *See BMW*, 517 U.S. at 568; *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Haslip*, 499 U.S. at 22. The enormous variability of the dollar punitive awards assessed against identical defendants in identical cases belies any suggestion that juries in the ordinary course attempt to implement coherent deterrence theories. *Assessing Punitive Damages*, 107 Yale L. J. at 2111-12. The experimental results do not rule out, of course, that juries in other settings might focus more systematically on deterrence if encouraged to do so. But additional recent studies by Professors Sunstein, Kahneman and Schkade and Professor Viscusi cast serious doubt on whether in fact they ever would.

Under the law-and-economics theory of deterrence, punitive damages should be awarded only if the defendant has a chance of escaping liability. *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 874 (1998) ("*Economic Analysis*"). For optimal deterrence (*i.e.*, avoidance of overdeterrence),[16] punitive damages should equal the harm the defendant causes multiplied by the reciprocal of the probability that the defendant would not escape liability, less compensatory damages. *Id.*; *see also BMW*, 517 U.S. at 582 (noting that a higher ratio of punitives to compensatories may be justified where injury is hard to detect); *id.* at 592-93

[16] Overdeterrence is socially undesirable. Among other things, it leads to inefficient resource allocation, inducing companies to spend significantly more on precautions than the risk of harm would justify. Overdeterrence also stifles innovation, discouraging companies from undertaking risky activities, even when potential benefits would substantially outweigh potential costs. *See Economic Analysis*, 111 Harv. L. Rev. at 879-883; W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 299-327 (1998) ("*Social Costs of Punitive Damages*").

(Breyer, J., concurring) (discussing economic deterrence theory).

In a two-part study designed to assess attitudes about economic deterrence theory,[17] Professors Sunstein, Kahneman and Schkade asked mock jurors to assess punitive damages in personal injury scenarios in which probability of detection – the key variable from the standpoint of optimal deterrence – was varied dramatically. Changes in the probability of detection had no impact on jurors' awards, suggesting that jurors do not spontaneously factor optimal deterrence considerations into their judgments about appropriate punishment. In the second part of their study, the researchers asked law students trained in economic deterrence theory to agree or disagree whether, as that theory would suggest, a tort victim severely injured by egregious misconduct should be barred from recovering punitive damages because the tortfeasor had no chance of escaping detection. The great majority disagreed, suggesting that people may readily reject optimal deterrence considerations in the face of countervailing motivations – such as the desire to punish blameworthy conduct.

Professor Viscusi's study[18] tested jurors' ability to implement economic deterrence theory using model jury instructions proposed for that purpose by Professors Polinsky and Shavell. *See Economic Analysis*, 111 Harv. L. Rev. at 957-62. The results showed that even with explicit instructions, jurors had difficulty applying the theory correctly and proved insensitive to variables that should have made a difference in its application. Again, the data support the con-

[17] Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. Legal. Stud. 237 (2000).

[18] W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics* (working paper on file with Harvard John M. Olin Center for Law, Economics, and Business, www.law.harvard.edu/programs/olin_center/) (2000)

clusion that erratic and unpredictable jury-imposed punitive damage awards do not reflect any coherent deterrence theory.

C. Jury Punitive Damage Awards Are Inherently Subject to Arbitrary and Improper Influences.

A final important point from the Sunstein, Kahneman and Schkade studies is that the absence of reliable reference points for translating shared outrage into dollar punitive awards increases the likelihood that arbitrary "anchoring" effects and biases of various kinds will distort jurors' awards. Anchoring refers to the natural judgmental process of selecting an initial value (the "anchor") as a starting point from which to arrive at an award by a process of adjustment. Behavioral research shows that the values selected as the anchors often have a disproportionate influence on the outcome of the decision.[19] In the case of punitive damage decisions, which require jurors to map qualitative moral judgments to an unbounded dollar scale with no "modulus," the risk that arbitrary values selected as anchors will distort awards is particularly high. *See Assessing Punitive Damages*, 107 Yale L.J. at 2109-2110.

A study by Professors Hastie, Schkade and Payne demonstrates that this problem is very real.[20] The researchers pre-

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[19] *See* John W. Payne, et al., *Behavioral Decision Research: An Overview* 303-59 (1997) (reviewing behavioral literature on anchoring effects); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996) (discussing anchoring effect of plaintiff's *ad damnum* clause on compensatory awards).

[20] Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 Law & Hum. Behav. 445 (1999) ("*Effects of Plaintiff's Requests and Plaintiff's Identity*").

sented 174 mock jurors with punitive damages scenarios involving a chemical spill which disrupted a plaintiff's riverside business. To test the potential influence of arbitrary anchor effects, the researchers varied only the dollar amount of punitive damages requested in closing argument by the plaintiff's counsel, holding all other factors (nature of misconduct, amount of harm, size of defendant, etc.) constant. The results showed that the dollar award requested in counsel's argument dramatically influenced the size of the awards jurors actually made, with the median award rising roughly in proportion to the increase in magnitude of the lawyer's request. *See Effects of Plaintiff's Requests and Plaintiff's Identity*, 23 Law & Hum. Behav. at 463.

Professor Viscusi observed similar anchoring effects in his study testing jurors' ability to assess punitive damages in accordance with instructions on how to compute optimal deterrence values (*see* n.18, *supra*). Jurors' awards increased substantially when case scenarios included a dollar punitive amount requested by plaintiff's counsel, to the detriment of the deterrence computations the instructions sought to encourage.

The anchor study by Professors Hastie, Schkade and Payne also tested for another source of arbitrariness in punitive damage awards – bias favoring local plaintiffs. Here the researchers held all factors in the chemical spill scenario constant except the identity of the plaintiff. In one version they identified the plaintiff as a locally-owned corporation; in the other the plaintiff became a division of a geographically remote corporation. Mock jurors awarded much higher punitive damages to local plaintiffs, even though the defendant, the misconduct and the harm were the same in all cases. *See Effects of Plaintiff's Requests and Plaintiff's Identity*, 23 Law & Hum. Behav. at 449, 466.

Additional studies led by Professors Hastie and Viscusi have identified numerous additional cognitive biases that dis-

tort punitive damage awards. Another study by Professors Hastie, Schkade and Payne,[21] for example, shows that juries assessing punitive damages exhibit severe hindsight bias in evaluating the *ex ante* foreseeability of conduct leading to accidents blamed on recklessness. The failure to take precautions that most jurors thought not necessary *ex ante* was deemed reckless by most jurors considering the same facts *ex post*. Such hindsight effects are common in the behavioral literature,[22] but appear particularly troublesome in the punitive damages setting. While this type of cognitive bias most directly affects punitive damage liability decisions, it potentially may distort determination of dollar punitive awards as well, by skewing reprehensibility determinations.

Professor Viscusi's work has focused principally on measuring jury attitudes about risk. It shows that typical jurors harbor many irrational beliefs about risk that distort punitive awards. Among other things, jurors systematically overestimate small probabilities and underestimate large ones, producing exaggerated blame for unlikely accidents and incoherence in judgments under uncertainty.[23]

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[21] Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 Law & Hum. Behav. 597 (1999).

[22] *See, e.g.*, Susan J. Labine & Gary Labine, *Determinations of Negligence and the Hindsight Bias*, 20 Law & Hum. Behav. 501 (1996); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 Law & Hum. Behav. 89 (1995).

[23] Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 Ariz. L. Rev. 901 (1998); *Social Costs of Punitive Damages*, 87 Geo. L.J. at 327-32 (1998); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, (working paper on file with Harvard John M. Olin Center for Law, Economics, and Business, www.law.harvard.edu/programs/olin_center/) (Journal of Legal Studies, forthcoming 2001).

Perhaps the most striking anomaly found by Professor Viscusi on this topic concerns jury attitudes towards corporate cost-benefit analyses of potential safety precautions. In a 500-person mock jury study designed to test the impact of cost-benefit analysis on the size of punitive awards,[24] he found that jurors awarded much higher punitive damages against companies that undertook cost-benefit analyses than against companies that did not. And when the companies that performed the cost-benefit analyses were liberal in their valuation of potential risks – leading them to take greater precautions – jurors punished them more severely than companies that had underestimated the same risks.

Significantly, Professor Viscusi has also found that judges tend to be significantly more rational than jurors in their evaluation of risk. In a survey of nearly 100 judges designed to test judges' susceptibility to the same sorts of cognitive biases that skew juror attitudes about risk,[25] judges, being human, naturally exhibited some of the same biases (such as hindsight bias), but to a lesser degree. No doubt due to their experience and training, judges did a much better job than jurors of putting aside potential biases that might affect their decisions about risk.

II. NON-DEFERENTIAL JUDICIAL REVIEW AT BOTH THE TRIAL AND APPELLATE LEVELS IS ESSENTIAL TO ENSURE THAT PUNITIVE DAMAGES DO NOT EXCEED DUE PROCESS LIMITS

The empirical studies discussed in the preceding section strongly reinforce this Court's conclusion in *Honda* that

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[24] W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000).

[25] W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 Am. Law & Econ. Rev. 26 (1999).

meaningful judicial review of the size of punitive damage awards is essential to protect defendants against "lawless, biased, or arbitrary verdict[s]." 512 U.S. at 433. As the studies show, dollar punitive awards made by juries are erratic and unpredictable, unconstrained by either community views of appropriate dollar punishment or coherent deterrence theories, and highly susceptible to arbitrary anchor effects and cognitive biases. It follows that both "fair notice of ... the severity of the penalty that ... may [be] impose[d]," *BMW*, 517 U.S. at 574, and "uniform general treatment of similarly situated persons," *id.* at 587 (Breyer, J., concurring), depend critically on the presence of additional procedures that "assure 'meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,' and permit 'appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Id.* (quoting *Haslip*, 499 U.S. at 20-21).

Juries assessing punitive damages do so as one-time decisionmakers in isolated cases. Constitutional review under *BMW*, by contrast, properly requires evaluation of their awards in a much broader context. Under the "reprehensibility" guidepost, courts must compare the blameworthiness of misconduct in question with that of other punishable conduct, not before the jury, for purposes of gauging whether substantial punitive damages are justifiable. 517 U.S. at 575-80. Under the "ratio" guidepost, courts must assess the reasonableness of the punitive award in relation to the actual or likely harm from the misconduct, again drawing on comparisons with other cases and consideration of factors (such as likelihood of detection) that might make a higher or lower ratio reasonable. *Id.* at 580-83. And under the "sanctions for comparable misconduct" guidepost, courts must consider legislative judgments concerning the appropriate punishment – a measure of community views on dollar punishment both

more reliable and more legitimate than the erratic and unpredictable decisions of isolated juries. *Id.* at 583-85.

Rigorously and consistently applied, the *BMW* guideposts could help bring a measure of predictability to punitive damages that is now sorely lacking. Predictability will come, however, only with the development a meaningful body of appellate precedents to guide the interpretation and application of the guideposts at the trial court level. For that to happen, non-deferential review is required. As the Court recently held in an analogous context:

> [L]egal rules ... acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.

Ornelas v. United States, 517 U.S. 690, 697 (1996).

Appellate courts are equally as competent as trial courts to undertake the constitutional analysis *BMW* requires (and which this Court, of course, itself undertook in *BMW*). A policy of sweeping deference – such as that applied by the Ninth Circuit in this case – is an abdication of responsibility to enforce the constitution.

CONCLUSION

For all the reasons stated above, the decision of the Ninth Circuit should be reversed and remanded with the instructions that the appellate court should conduct a searching and non-deferential review of the constitutionality of the underlying punitive award.

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In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations and 140,000 direct members of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business. This brief is filed because the sound and fair administration of punitive damages is a matter of profound concern to the Chamber's members.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Punitive damages are "strong medicine" (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996)) that require appropriate procedural safeguards to contain the "acute danger of arbitrary deprivation of property" that they pose (*Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). Adequate jury instructions are important to this end, but not sufficient: "Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses * * *." *Ibid.* Hence, it is essential that jury awards receive meaningful judicial scrutiny. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-16 (1991) (describing common law procedure); *Oberg*, 512 U.S. at 432 (judicial review of punitive awards is required by due

[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

process). Critically for present purposes, "*both* 'meaningful and adequate review by the trial court' *and* subsequent appellate review" have long been considered necessary to provide an adequate check against the risk of excessive punishment. *Oberg*, 512 U.S. at 420-421 (quoting *Haslip*, 499 U.S. at 20) (emphasis added); see also *Haslip*, 499 U.S. at 15 (noting that, traditionally, a jury award of punitive damages is "reviewed by trial *and* appellate courts to ensure that it is reasonable") (emphasis added).

The specific question here focuses on the federal appellate standard for reviewing a district court's ruling that the jury's punitive award was not unconstitutionally excessive. The standard-of-review issue, however, does not arise only in the case of constitutional challenges to punitive awards. Federal courts of appeals confront the same issue when excessiveness challenges are raised under substantive state law standards, which often overlap those of *Gore* (see, *e.g.*, *Haslip*, 499 U.S. at 20-22 (setting forth Alabama's standards)), or when the case arises under federal law (see, *e.g.*, *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355-1356 (7th Cir. 1995) (reviewing Title VII punitive award).

The Seventh Amendment does not constrain the decision here, because in reviewing punitive awards for excessiveness trial and appellate courts are not re-examining any *fact* found by the jury. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting). In contrast to the finding of liability for the tort, from which it may be inferred that the jury found each of the indispensable elements of the tort, or the finding of liability for punitive damages, from which it may be inferred that the jury found the defendant's conduct to meet the state's standard (*e.g.*, malice or recklessness), it is not possible to infer from the *amount* of punitive damages that the jury made any particular finding.

The Court accordingly is free to select the standard of review that will best protect the constitutional rights at stake and most likely lead to a fair and tolerably consistent regime of punishments. Because the determination whether a punitive award exceeds lawful limits is a predominantly legal one, requiring comparison with conduct, punishments, and punitive/compensatory ratios in other cases, appellate courts are well suited to the task. Accordingly, both the institutional advantage enjoyed by appellate courts and the importance of obtaining consistency across cases dictate the need for non-deferential appellate review.

This case perfectly illustrates the need for meaningful appellate scrutiny. Cooper's conduct, even if reprehensible enough to cross the threshold separating punishable from non-punishable conduct, surely did so by only the barest of margins. Also, the harm suffered by Leatherman was slight, and any improper profits earned by Cooper as a result of its wrongful conduct were fully disgorged (and more) under the applicable measure of compensatory damages. Nevertheless, the jury, which received no meaningful guidance as to how to quantify the punishment, returned a startling $4,500,000 punitive verdict, 90 times the size of the already generous compensatory award. In the face of these considerations, the district court brushed off Cooper's excessiveness challenge with the observation that, in effect, its conduct had been less than perfect and it was a big company. Not a single consideration pertinent to the excessiveness inquiry received meaningful attention.

When the issue reached the court of appeals, that court did nothing more than invoke the abuse-of-discretion standard as justification for refusing to examine in any meaningful way what the district court had done. By so doing, it declined to treat a number of plainly legal issues embedded in the district court's ruling, most notably: (1) What factors in this case, if any, support punitive damages in such a high multiple of

compensatory damages? (2) In what respect, if any, was Cooper's conduct so reprehensible as to warrant especially severe punishment? Or, alternatively, may the degree of reprehensibility be ignored in considering the excessiveness claim? (3) May seven-figure punitive damages be upheld merely on the basis of the defendant's financial circumstances?

These fundamentally legal questions deserve answers that advance the development of coherent and relatively uniform punishment criteria, especially when, as here, constitutional rights are at stake. It should not be acceptable in a fair and rational punishment system to adopt a standard of appellate review, as the Ninth Circuit has done, that effectively deprives trial courts of meaningful guidance for the performance of the excessiveness inquiry. Here, an apparently aberrational verdict returned by a poorly informed jury with no prior experience in judicial punishment was left undisturbed by a seemingly ill-considered trial court ruling (with which most other judges likely would have differed), yet these troublesome circumstances produced on appeal nothing more than a simple disclaimer of appellate responsibility.

In his concurring opinion in *Gore*, Justice Breyer observed that "detailed examination," rather than "more deferential review," is dictated when "rules that purport to channel discretion" "[do] not do so in fact." 517 U.S. at 594-596. As the present case confirms, the absence of meaningful constraints on jury discretion is inherent in any system in which juries are called upon to make unbounded punishment determinations. Accordingly, non-deferential review is necessary to ensure "the application of law, rather than a decisionmaker's caprice" and thereby "assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Id.* at 587.

ARGUMENT

I. PUNITIVE DAMAGES EXCESSIVENESS CLAIMS PRESENT PREDOMINANTLY LEGAL ISSUES

"[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The standard of review thus turns on the nature of the district court's decision on a claim that a punitive damages verdict is excessive (either constitutionally or otherwise). Such an analysis establishes that these determinations could reasonably be classified either as rulings of law or as mixed fact-law questions, but that in either event appellate review should be *de novo*.

A. A Trial Court's Ruling On Excessiveness Requires Application Of Legal Standards.

Just as it is not possible to discern the appropriate standard of appellate review without an understanding of the function being performed by the trial court, so one cannot understand the trial court's role without a clear picture of the jury's function.

1. First, a jury's selection of a punitive amount is not at all like its determination of liability for the underlying tort or for punitive damages. The latter, like a finding of guilt in a criminal case, must be supported by proof of each of a number of identified elements. Because a finding of liability *is* a finding that each indispensable element has been established, the standard of review is the same as for any other jury finding of fact: the reviewing court determines "whether, after viewing the evidence in the light most favorable to the prosecution [or plaintiff], *any* rational trier of fact could have found the essential elements of the crime [or of the tort or of punitive

liability]" under the applicable standard of proof. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

In contrast, the jury's function in setting the amount of punitive damages does *not* involve determining whether any particular fact has been proven. The jury accordingly is *not* instructed that it must find particular facts and rarely, if ever, is told to return a special verdict answering specific factual questions bearing on the amount of punitive damages. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish. Sometimes, but by no means always, juries are also instructed on various factors that the state considers relevant to the setting of punitive damages, such as the nature of the defendant's wrong, the extent of harm it inflicted or threatened, and, occasionally, additional factors such as the defendant's motives, its conduct following discovery of its wrongdoing, the profitability of the misconduct, and the defendant's finances. See, *e.g.*, *Oberg*, 512 U.S. at 441 n.6 (quoting Oregon instruction); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 463 n.29 (1993) (quoting West Virginia instruction); *Haslip*, 499 U.S. at 6 n.1 (quoting Alabama instruction).

The present case is typical. The jury was instructed under Oregon law to consider the following factors in setting its punitive award: (1) the character of the defendant's conduct; (2) the defendant's motive; (3) the sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and (4) the defendant's income and assets. J.A. 14. But, as is almost universally the case, the jury was given no guidance as to how to weigh those factors. It was not, for example, told that the net worth of a defendant cannot justify a high award if the degree of reprehensibility is

low, a proposition that is implicit in *Gore* and that has been expressly articulated by several lower courts.[2]

Moreover, it is typically the case that juries are not instructed on all of the factors that reviewing courts consider in evaluating whether a jury's punitive verdict is excessive under state law or the Due Process Clause. For example, as is common practice in the federal courts, the jury in this case was not instructed to consider two of the three critical excessiveness guideposts identified in *Gore* – namely, the amount of harm suffered by the plaintiff and the civil and criminal penalties applicable to the defendant's conduct. See 3 DEVITT *ET AL.*, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 85.19, at 345-346 (1987) (setting forth standard federal instruction, which mentions none of the *Gore* guideposts); EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS: CIVIL § 4.53, at 75-76 & n.3 (1999) (model instruction for punitive damages in civil rights actions fails to mention *Gore* guideposts); FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CIVIL § 15.13, at 198

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[2] See, *e.g.*, *Bowden v. Caldor, Inc.*, 710 A.2d 267, 279 (Md. 1998) ("merely because a defendant may be able to pay a very large award of punitive damages * * * does not justify an award which is disproportionate to the heinousness of the defendant's conduct"); *Leab v. Cincinnati Ins. Co.*, 1997 WL 360903, at *16 (E.D. Pa. June 26, 1997) ("To accept [plaintiff's] contention that a punitive damages award against a wealthy corporate defendant must be significant in order to have any effect would mean that any punitive damages award against a Fortune 500 company must necessarily be in the millions of dollars to affect the company's behavior. The law makes no such requirement.") (citation omitted); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997) (defendant's wealth could not justify $750,000 punitive award when none of the *Gore* factors supported an award of that amount); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032, 1044 (S.D. Ind. 1997), vacated on other grounds, 142 F.3d 367 (7th Cir. 1998); *Florez v. Delbovo*, 939 F. Supp. 1341, 1345 (N.D. Ill. 1996); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513, 531 (D. Utah 1996), aff'd, 154 F.3d 1212 (10th Cir. 1998), cert. denied, 526 U.S. 1051 (1999).

(1999) (pattern instruction states only: "[T]he amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages.").

Likewise, courts generally do not inform juries of some important state-law limits on the size of punitive damage awards, including other punitive awards against the same defendant for the same course of conduct, or punitive awards levied against other defendants for comparable conduct. Indeed, some states affirmatively prohibit jury instructions on particular factors. See, *e.g.*, *Wilson v. Dukona Corp., N.V.*, 547 So. 2d 70, 73 (Ala. 1989) ("jury is not allowed to consider the financial position of the defendant," but "defendant's financial position is * * * a consideration essential to a post-judgment critique of a punitive damages award"); *Bowden*, 710 A.2d at 281 (jury should not be instructed on other punitive awards, either against the defendant or against others, but court may consider those awards in reviewing for excessiveness); *id.* at 285 ("simply because a principle should be considered by the court in reviewing a punitive damages award for excessiveness does not mean that the same principle should give rise to an appropriate issue at the trial before the jury or an appropriate issue for a jury instruction"); 1 SCHLUETER & REDDEN, PUNITIVE DAMAGES § 5.6(B)(4), at 310-331 (2000) (reproducing sample state jury instructions).

In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. This mode of proceeding contrasts strikingly with the manner in which federal courts have traditionally set criminal penalties, and even more so with current practice. The federal criminal sentencing process begins with the preparation of a presentence report by a probation officer that contains various factual determinations pertinent to sentencing – for example, the crime of which the defendant was convicted, the

defendant's criminal history, whether a weapon was present when the crime was committed, the extent of the loss suffered by the victims, the vulnerability of the victims, the role of the defendant in the offense, and the defendant's acceptance of responsibility and cooperation with authorities. Often, these facts are undisputed; if a fact is in dispute, the trial court must weigh the evidence and make its own finding before it may rely on the disputed fact in sentencing. Under the sentencing guidelines, the uncontested facts and the additional facts found by the court are used to establish an offense level and a criminal history score. A grid is then consulted to determine the range of sentences that may be imposed. The district court chooses a penalty from within the range unless it finds a basis for either an upward or downward departure, in which case the basis for departure must be explained. The purpose and effect of this process are to ensure, to the greatest extent practicable, that defendants of similar culpability are treated similarly. See *Koon v. United States*, 518 U.S. 81, 92 (1996); *Mistretta v. United States*, 488 U.S. 361, 365-368 (1989).

A jury setting punitive damages benefits from none of the refinements and guidance available to a sentencing judge. Unlike a sentencing judge, whose determination of a criminal penalty receives highly deferential review except to the extent it may reflect embedded errors of law (*Koon*, 518 U.S. at 96-100), a civil jury is not constrained by a range of penalties that has been carefully designed for the particular conduct at issue. Nor (unlike the sentencing judge) is the jury required to make subsidiary factual findings that truly structure and discipline its punishment inquiry.

2. The task of setting an amount of punitive damages also differs markedly from that of fixing compensatory damages. A jury's determination of compensatory damages, although governed by the substantive tort principle of "make whole" damages, requires factual findings about the extent of the

plaintiff's injury.[3] To take a recent example, in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), the task for the jury and lower courts was to determine the dollar value of the plaintiff's missing property – an inherently factual inquiry. See *id.* at 420-421 (describing differing assessments of the value of the plaintiff's loss). By contrast, as three members of this Court have already expressly concluded, "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 459 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (citation omitted); see also *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996) (jury's punitive award is "not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct"). To be sure, the setting of punitive damages may involve some implicit factual determinations – for example, that the defendant was or wasn't involved in an effort to cover up its misdeed.[4] But the ultimate determination is an essentially unbounded judgment call. See, *e.g.*, FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CIVIL § 15.13, at 198 (1999) ("the amount can be as large as you believe necessary to fulfill the purposes of punitive damages").

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[3] This is not to say that it will necessarily be easy to quantify the amount of harm suffered by a plaintiff: often it will be difficult, particularly with respect to awards for pain and suffering. But whatever difficulties of valuation exist, the question being asked is still factual: how much loss has flowed or will flow from the defendant's actionable conduct?

[4] It bears repeating, however, that juries are seldom asked to render special verdicts with regard to the amount of punitive damages. Hence, there generally is no way for a reviewing court to know whether or not the jury found a particular aggravating (or mitigating) fact.

3. It follows from this that the suggestion that a jury's award of punitive damages should be reviewed by the trial court under *Jackson*'s rational juror standard (see Brief of Erwin Chemerinsky and Arthur F. McEvoy as Amicus Curiae In Support of Petitioner (filed Aug. 3, 2000)) is misguided. Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, deference to phantom factual determinations is unwarranted.[5]

Moreover, the judicial task in ruling on an excessiveness claim is fundamentally different from that of the jury in setting a verdict in the first instance. The trial court's job is to determine, under the standards and factors articulated by state law and federal constitutional law, whether the amount selected by the jury has gone beyond the boundary that marks the limits of its discretion. The jury is not asked anything about the outer limits of lawful punishment, but instead is asked to select a place within the allowable range that is appropriate for the case before it (never knowing, of course, what the high end of that range might be). The trial court's function in reviewing the jury's gestalt judgment is a quintessentially "legal" one that involves consulting precedent and making comparative judgments. In general, the *Gore* guideposts (and state-law factors) entail this sort of legal inquiry.

Consider the first guidepost: the *degree* of reprehensibility of the defendant's conduct. Although the jury is instructed to

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[5] To take an example from undersigned counsel's actual experience, it is impossible to discern merely from the size of a $150 million punitive verdict against a large corporation whether the jury found the defendant's conduct to be especially reprehensible, as was argued by plaintiffs' counsel in defending the award, or instead concluded, as a number of jurors stated during post-verdict interviews, that, although the jury did not deem the conduct to be especially reprehensible, neither was an award of that magnitude seen as severe punishment given the defendant's hefty finances.

consider "the character of the defendant's conduct," it is given no guidance as to what that means. It is not told, for example, that conduct that barely passes the threshold for punitive liability (as surely is the most that can be said of petitioner's conduct in this case) properly warrants only a small penalty. See *Gore*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."). Nor is the jury instructed that "some wrongs are more blameworthy [and hence warrant higher penalties] than others" (*id.* at 575), much less given any guidance for determining where on the "hierarchy of reprehensibility" (*Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 785 (N.D. Ind. 1996)) the conduct at issue should be placed.

We submit that the ascertainment of a reprehensibility spectrum that is coherent, rational, and consistent across cases is a function that only courts can carry out effectively. Even if juries were routinely provided with detailed guidance for locating conduct on the reprehensibility spectrum, and required to make the necessary factual findings (*e.g.*, whether the conduct was an isolated incident or part of a pattern), they would remain at a marked institutional disadvantage when it comes to monetarizing the effect of those findings. Unlike courts, which have the benefit of being able to compare conduct in one case with that in prior cases, juries operate largely with blinders on. Having reached an assessment of the degree of culpability of particular conduct, they remain without means of knowing what weight that reprehensibility level ought to be given in the complex, multi-factor punishment calculus. Courts, by contrast, have the experience and the access to information necessary to determine whether a particular dollar figure is or is not excessive for conduct of a particular type. See, *e.g.*, *Mathie v. Fries*, 121 F.3d 808, 817 (2d Cir. 1997)

(comparing punitive award in case at bar to those in cases involving similar misconduct, and reducing award from $500,000 to $200,000); *Schimizzi*, 928 F. Supp. at 783-785, 786, 787 (comparing punitive award in bad faith case to prior Indiana bad faith awards, and reducing punishment from $600,000 to $135,000). As three members of this Court observed in *Gore*, jurors cannot be expected "to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law." 517 U.S. at 596 (Breyer, J., concurring, joined by O'Connor and Souter, J.J.).

The ratio of punitive to actual or potential harm provides the second due process guidepost. While this standard includes a factual component – the jury's assessment of the plaintiff's actual damages – it too, involves a predominantly legal inquiry. The question asked by the district court is not simply: "What is the ratio?" Rather, it is whether the disparity between the punitive damages and the compensatory award (and/or the plaintiff's potential, but unrealized, harm) is so dramatic as to be outside the "constitutionally [or legally] acceptable range." *Gore*, 517 U.S. at 583 (characterizing the 500:1 ratio approved by the Alabama Supreme Court as "breathtaking"). The ratio analysis entails a normative judgment as to the legally tolerable extent of disparity. This, too, requires a comparison between the ratio in the case under review and those in other cases in order to give effect to the legal standard requiring a reasonable relationship between the punishment and the harm caused or threatened. *Id.* at 581-582 (contrasting ratio approved by Alabama courts with ratios upheld in *Haslip* and *TXO*).

Importantly, neither reprehensibility nor ratio is an independent variable. All else being equal, the tolerable ratio increases with the degree of reprehensibility of the conduct and declines as the amount of compensatory damages rises. For example, a case of low reprehensibility may warrant a 1:1 ratio,

while substantially more egregious conduct causing the same amount of harm may justify a 4:1 ratio (or even more in exceptionally egregious instances). Similarly, a ratio of 100:1 or higher may be justified when compensatory damages are nominal or small, while a ratio of even 1:1 may be excessive when compensatory damages are high (see, *e.g.*, *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467-468, 468-469 (3d Cir. 1999) ($50 million punitive award reduced to $1 million where compensatory damages were $48 million), cert. denied, 120 S. Ct. 791 (2000)), and/or when they substantially exceed the defendant's gain from the wrongful conduct. Yet the only non-arbitrary way to determine whether a particular ratio is excessive for the particular set of variables present in a given case is to consider ratios that have been permitted in other cases. Juries cannot and do not perform that inherently legal function. Only judges can.

The third *Gore* guidepost is the most transparently legal in nature, for it requires the reviewing court to consider whether the jury's award is "substantially greater" than statutory penalties for comparable conduct. 517 U.S. at 584. For this component of due process analysis, the court must undertake traditional legal research, seeking to identify potentially applicable statutes and penalties.[6] Then it must once again offer a judgment as to whether the disparity between those penalties and the jury award is so substantial as to indicate that

[6] This is not to say that, when the appropriate penalty for comparison purposes is obvious, the jury should not be told about it. But often there will be dispute as to the existence of an analogous penalty or the manner of its application; resolution of such disputes presents a legal issue for the court. Moreover, once any such dispute is resolved – whether it is before the jury retires to deliberate (in which case it should be instructed to consider that penalty) or after – the question whether the statutory penalty gave adequate notice of the amount of the jury's punishment is ultimately a legal one for the court to make based in part on disparities between the verdict and statutory penalties that have been tolerated or disapproved in prior cases.

the verdict is profoundly out of line with legislative judgments as to the appropriate punishment for such conduct, so that the defendant lacked fair notice that it was risking sanctions of the magnitude issued by the jury.

As part of the notice-based inquiry under the third guidepost, the Court observed that, "at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment." 517 U.S. at 584. In reaching that conclusion, the Court obviously undertook its own survey of punitive damages cases. That, needless to say, is a legal function to be performed by courts. By contrast, it makes no sense to treat the existence or non-existence of prior, equivalently sized punitive awards for similar conduct as a factual issue that a jury can routinely resolve and as to which judicial deference is warranted.

4. In each of the foregoing respects, the excessiveness inquiry under *Gore* and comparable state-law standards is analogous to the application of a statutory damages cap, which surely presents a straightforward question of law with respect to which the jury is owed no deference. See, *e.g.*, *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 910 (9th Cir. 1999); *Hudson v. Reno*, 130 F.3d 1193, 1199 (6th Cir. 1997). Of course, damage caps are stated in absolute and fairly precise terms, whereas the legal standards for excessiveness involve relative and more ambiguous standards. Thus, one may debate the respective merits of these two modes for controlling damages. Compare *Gore*, 517 U.S. at 582-583 (rejecting categorical approach), with *id.* at 605 (Scalia, J., dissenting) (criticizing "guideposts" approach). Still, the mere fact that *Gore* and state laws articulate their excessiveness standards in relative and somewhat malleable terms does not deprive them of their status as legal standards against which the size of a punitive award must be measured. As this Court explained in a slightly

different context, the fact that the district courts are called upon to apply standards that are not reducible to a "'neat set of legal rules'"does not of itself rob the district court's decision of its legal nature. *Ornelas v. United States*, 517 U.S. 690, 695-696 (1996) (district court rulings concerning "reasonable suspicion" and "probable cause" are legal rulings reviewable *de novo* notwithstanding the ambiguity of those concepts).

B. *De Novo* Appellate Review Of Excessiveness Rulings Is Supported By The Comparative Institutional Advantages Of The Appellate Courts.

Whether the district court's ruling is classified as one of law or as a mixed fact-law determination, *de novo* review is proper. To determine the standard for reviewing mixed questions, this Court asks whether, "'as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" *Pierce*, 487 U.S. at 559-560 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Because the appellate courts are removed from the logistical and time constraints faced by trial courts, and because they sit in panels, they enjoy an advantage when it comes to undertaking comprehensive legal analysis. *Salve-Regina College v. Russell*, 499 U.S. 225, 231-232 (1991). Appellate courts are also in a better position to engage in law elaboration – to establish uniformity and coherence across cases and hence to improve predictability. *Id.* at 231.[7]

[7] By contrast, the determination under Rule 59 that the size of a verdict is (or is not) against the *weight* of the evidence or is (or is not) unjust is a discretionary one, subject to review only for abuse of discretion. So too is the selection of a remittitur amount below the legal maximum. Thus, if a district court were to conclude that (i) a $4.5 million punitive award is unconstitutional, (ii) the constitutional maximum is $1 million, but (iii) that amount would still be against the weight of the evidence, and (iv) a new trial should be ordered unless the plaintiff accepts a remittitur to $500,000, the first two determinations should be reviewed de novo, while the latter two should be reviewed only for abuse of discretion.

Finally, it merits mention that even the most conscientious trial judge's assessment of punitive verdict amounts is often colored, if only subconsciously, by his or her attitude toward the conduct of defense counsel or witnesses at trial. Non-deferential appellate review is thus warranted as a means of providing a detached second look at such awards to ensure that they reflect only the underlying tortious conduct.[8] See, *e.g.*, *Mathie*, 121 F.3d at 817 ("review of punitive awards for excessiveness is an especially appropriate context in which the reflective role of a court of appeals follows the often dramatic arena of a trial court"); see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (affirming meaningful appellate review of a district court's finding of "actual malice" in part because that finding was evidently bound up with the district judge's frustration over the principal defense witness's "capacity for rationalization").

The foregoing considerations suggest that the appellate courts have a comparative advantage over trial courts in determining the question whether a punitive damage award is excessive. To be sure, such independent review "necessarily entails a careful consideration of the district court's legal analysis." *Salve-Regina*, 499 U.S. at 232. And where, unlike

[8] Although it is well established that discovery abuse and other litigation conduct should not be considered in setting punitive damages (see, *e.g.*, *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 794 F.2d 763, 768 (2d Cir. 1986); *Midwest Enters., Inc. v. Generac Corp.*, 1993 WL 311944, at *1 (N.D. Ill. Aug. 10, 1993); *FDIC v. British-American Corp.*, 755 F. Supp. 1314, 1329 (E.D.N.C. 1991); *Citizens & Southern Nat'l Bank v. Bougas*, 265 S.E.2d 562, 563 (Ga. 1980); *Gonzales v. Surgidev Corp.*, 899 P.2d 594, 597 (N.M. 1995); *James v. Powell*, 225 N.E.2d 741, 747 (N.Y. 1967)), it is unrealistic to expect trial courts to remain wholly objective when reviewing an award imposed against a defendant whose agents (whether outside counsel, in-house counsel, or other in-house employees) the court regards to have been inadequately cooperative or even downright obstructive.

here, the district court has provided a focused analysis of punishment considerations, some subsidiary aspects of that analysis may reflect determinations that the district court is better positioned to make; as to them, an appellate court might justifiably elect to defer.[9] Nonetheless, after appropriate deference on such elements, the ultimate excessiveness decision must embody the independent judgment of the court of appeals.

As indicated above, the excessiveness inquiry under *Gore* and state-law standards is inherently comparative in nature. The courts are called upon to assess the relative reprehensibility of the defendant's conduct, as well as the relative disparity between the jury's punitive award and actual or potential harm, and between the punitive award and the statutory penalties for comparable conduct. Such inquiries, in turn, require careful and extensive review of decisional and statutory authority to determine where on the spectrum of reprehensibility to place the defendant's misconduct, whether the punitive/compensatory ratio in the case before the court is warranted in light of ratios that have been approved or disapproved in prior cases and the criteria utilized by the courts in identifying when comparatively high ratios may be condoned, and whether the analogous statutory penalties and/or prior punitive judgments could be said to have provided fair notice that the defendant could be mulcted in the amount imposed by the jury. Although district courts are by no means incompetent to perform these sorts of inquiries – and indeed should be required to undertake them diligently in the first instance – as in *Salve-Regina* they have no comparative advantage that justifies a deferential standard for reviewing their conclusions.

Furthermore, one of the basic ideas underlying the development of state and federal excessiveness standards is that

[9] For example, a trial court might be in a better position to determine the credibility of statements of contrition and/or promises of future changes by corporate executives.

the law of punitive damages ought to promote greater uniformity and predictability with respect to frequency and amounts. See *Gore*, 517 U.S. at 574 ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose") (footnote omitted); *id.* at 587 (Breyer, J., concurring) ("the uniform general treatment of similarly situated persons * * * is the essence of law itself"). In the absence of statutory guidelines, that goal is best achieved by independent appellate court supervision. Ambiguous concepts such as reprehensibility "acquire content only through application." *Ornelas*, 517 U.S. at 697. Appellate decision-making thus offers the best hope of infusing these initially vague standards with greater clarity and predictability. *Id.* at 697-698 (noting ability of appellate courts to clarify even such highly ambiguous terms as "probable cause" and "reasonable suspicion").[10]

That the legal standards of excessiveness will benefit from appellate elaboration distinguishes the instant case from those in which the Court has selected an abuse-of-discretion standard. In *Cooter & Gell v. Hartarx Corp.*, 496 U.S. 384 (1990), for example, the Court adopted abuse-of-discretion review of Rule 11 rulings in large part because it saw little to be gained by way of law-elaboration. Instead, resolution of the question whether

[10] At least one circuit has undertaken to provide its district courts with specific further guidance regarding the proper application of the *Gore* factors. See *FDIC v. Hamilton*, 122 F.3d 854, 861-862 (10th Cir. 1997) (stating that "in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio," that "even a 10:1 ratio will be unconstitutionally excessive in a broad range of cases," and that "[t]o determine the proper ratio in a given case," courts must compare the degree of reprehensibility of the defendant's conduct to that in prior punitive damages cases) (internal quotation marks and citation omitted).

a party was warranted in filing a particular pleading would have required the appellate courts to invest a good deal of effort in order to state "'not what the law now is, but what [a party] was substantially justified in believing it to have been.'" *Id.* at 403 (quoting *Pierce*, 487 U.S. at 561). *De novo* appellate review, by contrast, is favored when, as is true here, such review promises to introduce even a modicum of enhanced specificity into existing law. *Ornelas*, 517 U.S. at 697-698.

District courts do enjoy a comparative institutional advantage when dealing with issues involving the supervision of litigation, and those that depend heavily on assessments of witness demeanor or on information that can be gleaned "[b]y reason of settlement conferences and other pretrial activities." *Pierce*, 487 U.S. at 560. Relatedly, *de novo* review is resisted when the appellate court can obtain needed information only by performing "the unaccustomed task of reviewing the entire record." *Ibid.* Excessiveness review, however, necessitates no special access to pre-trial proceedings: instead, the reviewing court considers the evidence that was before the jury as well as whatever additional information (such as punitive awards in other cases) may have been submitted in support of the post-trial motions. Accordingly, it will seldom be necessary for the court of appeals to undertake an unguided tour of the entire record on appeal.[11] Moreover, this Court has noted that even a fact-intensive decision can warrant independent review if the stakes of the decision are such that it "ordinarily has * * * substantial consequences" for one of the parties, including the imposition of significant liability. *Id.* at 563.

[11] Of course, appellate review requires consideration of those portions of the record that have been relied on by the district court and/or the parties. That is hardly an "unaccustomed task": appellate courts routinely perform it when conducting, for example, *de novo* review of trial courts' determinations on motions for judgment as a matter of law.

The advantage of appellate courts is evidenced in the recent practice of both this Court and the courts of appeals. See *Ornelas*, 517 U.S. at 697 (that the Court had never deferred to trial courts in prior decisions concerning probable cause and reasonable suspicion suggests that deference is not warranted). In *Gore* itself, for example, there is no suggestion that appellate courts should defer to trial courts' determinations that punitive awards are not excessive. To the contrary, the Court's own evaluation of BMW's conduct, and its overall application of the three guideposts, exhibits none of the hallmarks of deferential review. Likewise, decisions of the courts of appeals often manifest little deference to trial courts or juries. See, *e.g.*, *United Phosphorous, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1229 (10th Cir. 2000) (*Gore* guideposts assessed *de novo*, without deference to jury or district court); *United States v. Big D Enters., Inc.*, 184 F.3d 924, 932-933 (8th Cir. 1999) (upholding award based on independent review of evidence), cert. denied, 120 S. Ct. 1419 (2000); *Inter Med. Supplies*, 181 F.3d at 469 (declining to defer to district court). But see *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334-1337 (11th Cir. 1999) (district court's rulings on reprehensibility and disparity between compensatory and punitive damages should be reviewed deferentially), cert. denied, 120 S. Ct. 329 (2000).

C. Abuse-Of-Discretion Review Threatens To Undermine The System Of Procedural Checks On Punitive Damages.

The traditional alternative to *de novo* review is review for abuse of discretion. As we argue below, a proper understanding of abuse-of-discretion review reveals that, at least where the issue is punitive damages excessiveness, even that standard does not entail uncritical appellate deference to whatever the trial court has determined. Nonetheless, the Court ought to avoid invoking the concept of abuse-of-discretion

review in the punitive damages context because it is susceptible to being misunderstood as permitting or demanding toothless deference that would undermine the system of procedural checks on punitive awards put in place by the states and by this Court. That danger is strikingly illustrated by the decision of the Ninth Circuit in this case.

At trial, the jury first concluded that Cooper had infringed Leatherman's trademark rights in its tool but that no damages flowed from that infringement. It did find, however, that Cooper had engaged in "passing off," unfair competition, and false advertising. For these causes of action, the jury awarded $50,000 in compensatory damages, reflecting Cooper's gross profits on ToolZall sales prior to withdrawal of the product from the market. The jury also awarded punitive damages in the amount of $4.5 million, 90 times the compensatory figure.

In the face of defendant's excessiveness challenge, the district court, rather than engaging in the meaningful review envisioned by *Haslip*, *TXO*, *Oberg*, and *Gore*, issued a conclusory statement that the award was justified in light of "the nature of the conduct, evidence of intentional use of the modified [PST] and the size of an award necessary to deter future similar conduct given defendant's size and assets." Pet. App. 24a. No attempt was made to gauge the relative blameworthiness of Cooper's actions as compared to conduct involving malice, violence, ongoing wrongdoing, etc. Likewise, the district court did not even comment on the 90:1 ratio of punitive to compensatory damages. Nor did it consider any comparable statutory penalties. On review, the Ninth Circuit recognized that no consumer deception had resulted from Cooper's use of the photograph, nor harm to the reputation of plaintiff's PST tool. It nonetheless upheld the district court, ruling that, in light of the continued occasional appearance of the offending photograph, the court had not "abuse[d] its discretion." Pet. App. 4a.

If ever a case illustrated the need for meaningful appellate review and the dangers of adopting an abuse-of-discretion standard for rulings on excessiveness, it is this one. Indeed, it is hard to imagine a case in which a multimillion dollar award of punitive damages could be less defensible: the conduct at issue reflected no malice and barely rose to the level of conscious, deliberate wrongdoing; it inflicted little harm on the plaintiff or others; the measure of compensatory damages (forfeiture of all profits from ToolZall sales regardless of the extent to which those profits were attributable to punishable wrongdoing) already goes far to satisfying the state's deterrent objectives; and nothing in applicable Oregon or federal law would have given Cooper the slightest indication that its failure to stop its distributors from using the photograph could subject it to a penalty of 90 times the already generous measure of compensatory damages. Yet the district court's "reasons" for sustaining this preposterous verdict were nothing more than that the defendant's conduct was such as to subject it to punitive liability and that the defendant was, in effect, large enough to afford the exaction.

The Ninth Circuit, in turn, simply disclaimed any responsibility for overseeing what the district court had done, treating abuse-of-discretion review as effectively no review at all, even as to embedded legal questions such as the legitimacy of sustaining a large award purely on the basis of a corporate defendant's finances. Compare cases cited at note 2, *supra*. As far as the court of appeals was concerned, an award of $4.5 thousand or of $4.5 million is equally valid, as long as the defendant can afford to pay it.

Rather than provide the "meaningful and adequate review" envisioned by this Court's decisions and necessary to ensure some minimum level of consistency and non-arbitrariness in punishments, the Ninth Circuit's conception of the appellate function will instead reinforce existing tendencies towards

unbridled and unchecked jury discretion – precisely the regime rejected by this Court in *Oberg*. See 512 U.S. at 432.

D. An Abuse-Of-Discretion Standard Is Not Compelled By *Browning-Ferris*.

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) ("*BFI*"), does not require use of the abuse-of-discretion standard in reviewing the issue of legal excessiveness. The bulk of the opinion in *BFI* was devoted to the question whether the Eighth Amendment provides a substantive constraint on the permissible size of a punitive award in a private civil case. The Court held that it does not, and that the petitioner's alternative reliance on the Due Process Clause had been waived. The Court went on to consider and reject the claim that federal common law also provides a substantive constraint on excessiveness. That left only state law as a possible source of legal limitation, but there was no claim before the Court that the judgment violated state law excessiveness standards.

In the course of discussing the argument invoking federal common law, the opinion contains the following dictum: "In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." *Id.* at 279 (footnote omitted).

The reference to "standards developed under Rule 59" is plainly to the branch of the Rule that empowers courts, in the interest of justice, to set aside verdicts that are against the weight of the evidence even if those verdicts are not so excessive as to be unlawful. Because Vermont had no criteria

for evaluating an award for excessiveness other than the state's general "grossly and manifestly excessive" standard (see *id.* at 278 n.24), the Court had no occasion to consider whether the standard for reviewing a district court's application of meaningful excessiveness criteria might differ from the standard applicable to the district court's exercise of its traditional "interests of justice" discretionary powers. It seems plain from the procedural posture of the case, as well as from the Court's repeated references to the district court's discretion regarding whether to grant a new trial (*id.* at 278, 279, 280), that the reference to the abuse-of-discretion standard was addressed only to the latter type of decision.[12]

Since the time of *BFI*, this Court and the states have developed objective legal standards to regulate the permissible size of punitive damage awards. As a result, the law today more clearly recognizes that district courts confronted with claims of excessive punitive damages perform two distinct tasks: (i) they determine whether the challenged punitive award is excessive *as a matter of law* (be it state law, federal statutory law, or federal constitutional law), and (ii) they decide whether the amount, even if not excessive as a matter of law, is so far against the weight of the evidence or otherwise unjust as to lead to the conclusion that the interests of justice require a new trial.[13] As the Eleventh Circuit has observed, the former inquiry

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[12] The same distinction appears to have been at work in *Gasperini*. In endorsing the abuse-of-discretion standard of review for claims of excessive compensatory damages, the Court stated: "The trial judge in the federal system * * * has . . . discretion to grant a new trial if the verdict appears to the judge to be against the weight of the evidence. This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." 518 U.S. at 433 (internal quotation marks, citation, and brackets omitted). The Court was not dealing with a claim that the award was excessive as a matter of law.

[13] Cf. *Tibbs v. Florida*, 457 U.S. 31 (1982) (double jeopardy protections

is in the nature of a ruling under Rule 50 that the verdict size is (or is not) sustainable as a matter of law, while the latter inquiry derives from the trial court's power to grant a new trial under Rule 59. *Johansen*, 170 F.3d at 1331-1332.[14]

Again, the comparison with fixed monetary caps is illuminating. When a trial court is confronted with a jury verdict that is supported by the evidence, yet exceeds an applicable statutory damages cap, the court does not typically order a new trial or offer the plaintiff the option to remit damages down to the cap. Rather, it simply reduces the verdict to the statutory ceiling and enters judgment as a matter of law. See, *e.g.*, *Patton v. TIC United Corp.*, 77 F.3d 1235, 1240,

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preclude retrial following finding of evidentiary insufficiency but not following trial court's "thirteenth juror" determination that verdict is against the weight of the evidence).

[14] Because the district court may grant a new trial in the interest of justice, it may likewise deny one subject to the plaintiff's remission of part of the award. The federal courts of appeals have split over whether the district court may suggest a remittitur to an amount that it determines to be fair and reasonable, or whether the remittitur instead must go no further than the maximum amount the jury could properly have awarded. Compare *Johansen*, 170 F.3d at 1332 n.20 (trial court may order a new trial unless plaintiff accepts a remittitur to an amount below the constitutional maximum), with *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1329 (2d Cir. 1990) (trial court's suggested remittitur may not be below maximum amount jury was permitted to award). The courts that have followed the latter view have not considered the differentiation discussed in text.

Some courts have suggested that a remittitur to an amount less than the legal maximum could run afoul of the Seventh Amendment. That concern is misplaced, for it is well-settled that the district court can order a new trial because of excessive damages without offering the plaintiff the option of remittitur at all. In addition, the plaintiff is always free to refuse the remittitur and proceed with a new trial. Thus, because the only effect of remittitur is to *increase* the plaintiff's options in the wake of a determination that justice necessitates setting aside the verdict, it is difficult to understand why the *amount* of a remittitur has any Seventh Amendment implications.

1245-1247 (10th Cir. 1996) (affirming district court's reduction of jury award pursuant to Kansas's cap on non-economic damages); *Wackenhut Applied Techs. Ctr., Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980, 983-985 (4th Cir. 1992) (affirming district court's reduction of punitive award pursuant to Virginia's cap).

The same practice holds true when a jury award includes an identifiable component of damages to which the plaintiff is not entitled as a matter of law, such as attorneys' fees or interest (*e.g.*, *New York, L.E. & W.R. Co. v. Estill*, 147 U.S. 591, 619-622 (1893) (striking the interest component of a jury award as unlawful and directing the trial court to enter judgment for the reduced amount)) or when a court determines awards for two claims to be duplicative (*e.g.*, *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1023 (district court correctly reduced $15,000 state-law award to $5,000 after finding it to be duplicative of $10,000 Title VII award), amended, 2000 WL 1638648 (9th Cir. Nov. 2, 2000)).

Several federal and state courts have recognized this power in the context of rulings on punitive damage awards. See, *e.g.*, *Johansen*, 170 F.3d at 1331 ("A constitutional reduction * * * is a determination that the law does not permit the award. * * * [T]he power to [reduce the verdict] is located in the court's authority to enter judgment as a matter of law."); *Inter Med. Supplies*, 181 F.3d at 470 (concluding that "[punitive] award greater than $1 million is not reasonably necessary to punish and deter" and remanding for entry of punitive judgment of $1 million) (internal quotation marks omitted); *Mathie*, 121 F.3d at 817, 818 (holding that "the punitive damages award in this case may not exceed $200,000," "reduc[ing] the award of punitive damages to $200,000, and remand[ing] for entry of a revised judgment consistent with this opinion"); *Bowden*, 710 A.2d at 287 (trial court may order reduction of award without providing option of remittitur or new trial).

For the reasons discussed in Part I.A, the inquiry into whether the award exceeds legal limits is a predominantly legal one. Because the question is whether the verdict breaches the legal limit, the district court does not exercise discretion in performing this first inquiry, and review therefore cannot logically be pursuant to an abuse-of-discretion standard.

By contrast, a decision to remit below the legal maximum is highly discretionary: it calls upon the district court, as supervisor of the trial, to weigh the evidence and consider, in the court's own best judgment, whether allowing the jury's award to stand will result in an injustice. It follows that, as is the case with other claims that a verdict is against the weight of the evidence, the district court's ruling on such a contention should be reviewed deferentially.[15] Of course, a finding that a verdict is *not* excessive, as in this case, necessarily is of the former rather than the latter type. It therefore calls for *de novo* appellate review.

II. EVEN IF REVIEW IS FOR ABUSE OF DISCRETION, THAT STANDARD ENTAILS ONLY LIMITED DEFERENCE IN THE EXCESSIVENESS CONTEXT

Even if abuse of discretion is the proper rubric, it does not follow that such review ought to be pro forma or highly deferential. See *Gasperini*, 518 U.S. at 447-448 (Stevens, J.,

[15] It is true that claims that punitive awards are excessive as a matter of law often are pursued by means of new trial motions under Rule 59 rather than by invocation of Rule 50. But the procedural avenue for raising the claim is of little moment. Many Rule 59 determinations are discretionary, but others – for example, a motion based on alleged errors in instructing the jury – are purely legal and are review *de novo* on appeal. It is the character of the alleged error that determines, in the first instance, the standard of review. Accordingly, when the motion (however denominated) asks the court to hold that the award exceeds the legal maximum, it asks the court to make a legal determination. That determination, even if rendered under Rule 59, is reviewable *de novo*.

dissenting). Whether a district court has 'abused' its discretion depends in large part on how much discretion the district court enjoyed in rendering its decision. In particular, when the district court is confronted with an issue that is largely legal in nature, abuse-of-discretion review is non-deferential simply because a district court by definition abuses its discretion when it makes a legal error. *Id.* at 441, 448. For example, although appellate courts review criminal sentencing rulings for abuse of discretion, when the issue is whether the district court was entitled as a matter of law to rely on certain factors in sentencing, "the court of appeals need not defer to the district court's resolution of the point." *Koon*, 518 U.S. at 100. As the Court explained, "[l]ittle turns * * * on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law." *Ibid.* (citation omitted). Similarly, in finding abuse of discretion to be the proper standard of review in Rule 11 cases, the Court emphasized that, were a sanction to be issued based on a misapplication of law, it would be reviewable and reversible as an abuse of discretion. *Cooter & Gell*, 496 U.S. at 402.

This Court and lower federal courts have applied similar reasoning to review of decisions awarding monetary or equitable relief in contravention of applicable legal standards. In *Pierce*, for example, the Court, applying an abuse-of-discretion standard (487 U.S. at 571), rejected a district court's upward adjustment of an attorney's fee award on the ground that the district court had misapplied the statutory "special factors" standard for such adjustments. *Id.* at 573-574; see also *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1012 (2d Cir. 1995) (reversing award of attorneys' fees as an abuse of discretion). In *Union Tool Co. v. Wilson*, the Court acknowledged that district courts have substantial discretion to

enter contempt orders and to set penalties for contempt, yet also insisted that a ruling "entered in such a proceeding is not exclusively or necessarily a discretionary one." 259 U.S. 107, 112 (1922) (citations omitted). As the Court explained, "legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." *Ibid.* (citations omitted). Finally, federal courts of appeals have held that, although district court rulings granting or denying injunctive relief are generally subject to abuse-of-discretion review, it is considered an abuse of discretion for the district court to misapply the law in determining, for example, the likelihood that a plaintiff's suit will ultimately prevail on the merits. *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981).

In short, use of the "abuse of discretion" label rather than the *de novo* label does not of itself settle the question whether appellate review will be deferential or meaningfully searching. The degree of review is instead tied to the nature of the district court's ruling. In *Gasperini* itself, the Court equated abuse-of-discretion review with deferential review not because the two concepts are co-extensive, but because it was confronted in that case with the question of how courts of appeal should review the almost purely factual question of how much economic damage the plaintiff in fact suffered. Given that sort of fact-driven ruling, the district court's conclusion was held entitled to deference. By contrast, as explained above, where the issue is the excessiveness of a punitive damage award under *Gore* or state law, the district court is required to determine whether the law permitted the jury to enter so large an award. Such a ruling is reviewable by the appellate court for legal error without deference, or at least without undue deference, to the trial court. Any other result would foster the essentially anarchic regime exemplified by the court of appeals' excessively deferential application of the abuse-of-discretion standard.

Respectfully submitted.

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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit association with 132 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983 PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including this Court, to present the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. A list of PLAC's corporate members is attached as Appendix A.

PLAC members engage in substantial litigation in both state and federal courts. A number of PLAC members have experienced punitive damage awards first-hand, and virtually all PLAC members live with the constant threat that a jury will convert a routine case into a litigation crisis by imposing a massive punitive damage award. Accordingly, PLAC members have a strong interest in ensuring meaningful appellate review of jury awards of punitive damages challenged as unconstitutionally excessive. PLAC, therefore, submits this brief in support of Petitioner.[1]

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[1] Both Petitioner and Respondent have consented to the filing of this brief. No counsel representing a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), recognized constitutional limits on excessive punitive damages awards. *BMW* requires trial courts to make a *legal* determination whether a punitive damage award that complies with state law nonetheless violates the federal Constitution. That ultimate determination is not a finding of fact and does not call for an exercise of discretion. Accordingly, appellate review for clear error or abuse of discretion makes no sense. Instead, appellate courts should review the trial court's ruling on the constitutional question of excessiveness the same way they review other legal determinations of constitutional dimension – *de novo*, *i.e.*, by applying the same legal test that the trial court applied without deferring to the trial court's conclusion.

Application of a *de novo* standard of review does not require the court of appeals to start from scratch. If the jury makes specific findings of fact (for example, through special interrogatories), appellate courts applying the *BMW* standard – like trial courts – should review those findings deferentially. Similarly, if the trial court makes its own written findings of fact the court of appeals should respect those findings, provided they are not clearly erroneous. But when it comes to the trial court's ultimate determination of constitutional excessiveness, the *de novo* standard applies. This is the same framework that governs the analogous context of the Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). There is no reason to apply a different scheme of review for a constitutional inquiry into excessiveness because it is required by the Fifth and Fourteenth Amendments rather than the Eighth.

The suggestion that courts should review punitive damage verdicts "in the light most favorable to the verdict" has a familiar ring, but only confuses matters. It makes no sense to apply such deference in determining the ultimate

constitutional question of excessiveness. The notion that reviewing courts should conduct their *BMW* review with a thumb on the scales in favor of approving the verdict misconstrues both *BMW* and the question before this Court. *BMW* requires a searching review, not a stunted and superficial review. Indeed, nothing in *BMW* itself suggests that this Court viewed the evidence in the light most favorable to the plaintiff in reviewing the award in that case. Moreover, the question here is how an appellate court should review a trial court's ruling concerning excessiveness, not the test that every reviewing court – both trial and appellate – should apply in conducting the *BMW* analysis.

Finally, nothing in the Seventh Amendment precludes appellate courts from reviewing a trial court's legal determination of excessiveness the same way they review other constitutional issues. First, the case law suggests that the jury's determination of the amount of punitive damages is not a "fact tried by a jury" within the meaning of the Re-Examination Clause. Second, and more fundamentally, *de novo* review of legal determinations does not require an appellate court to re-examine any fact.

ARGUMENT

I. THE NATURE OF THE EXCESSIVENESS INQUIRY MAKES A *DE NOVO* STANDARD THE PROPER STANDARD OF APPELLATE REVIEW

BMW imposes a substantive *legal* constraint on punitive damage awards, and the question of whether a challenged award comports with the constitutional limit is a *legal* question. This Court generally directs appellate courts to review legal questions, particularly questions of constitutional magnitude, *de novo*. In other words, appellate courts reviewing a legal question apply the same legal test as

the trial court, but reach their own conclusions without deferring to the trial court.

The legal question of constitutional excessiveness is no different. The jury is not asked, and does not answer, the legal question of constitutional excessiveness. Indeed, the question does not even arise until after the jury is discharged. The trial judge then determines whether the award complies with the Due Process Clause. An appellate court should review that legal judgment under a *de novo* standard of review.

A. Excessiveness Under *BMW* Is a Legal Issue, Not a Question for the Jury.

The question whether a punitive damage award is constitutionally excessive is an issue of law, not a question of fact or a discretionary judgment for the trial judge. Indeed, the question of constitutional excessiveness does not even arise until *after* the jury has rendered its verdict. For this reason, courts refuse to find an excessiveness challenge waived based on decisions made before the verdict. *See, e.g., MacCrone v. Edwards Center, Inc.*, 980 P.2d 1156, 1164 (Or. App. 1999) (*en banc*) (holding that an excessiveness challenge "cannot be required to be made during trial because the jury has not yet made its award"). The same courts, however, hold that challenges that implicate the jury's factfinding must be raised during trial. *See, e.g., id.* at 1163-64 (holding that defendant had waived a claim that there was insufficient evidence of malice to permit a punitive award by failing to raise it before the jury retired).

Not only does the issue of constitutional excessiveness not arise until after the jury is discharged, but the calculus of constitutional excessiveness includes factors that the jury normally does not consider under the relevant jurisdiction's law (which usually will be state law). *BMW* described three "guideposts" for courts to apply in determining whether a punitive award violates the Due Process Clause: "the degree

of reprehensibility of the [defendant's conduct]; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." 517 U.S. at 574-75.

The court's inquiry, guided by these factors, is distinct from the jury's task. Courts generally instruct the jury as to the state law of punitive damages. State laws provide varying degrees of direction and make different factors relevant to the jury's initial assessment of punitive damages. There is, however, no reason to suspect that the applicable law will focus the jury's attention on all the factors relevant to the court's constitutional inquiry under *BMW*.

For example, *BMW* makes clear that the court must examine the ratio between the jury's compensatory award and its punitive award to determine whether the punitive award bears the requisite "reasonable relationship" to the actual and potential harm threatened by the defendant's misconduct. *See id.* at 580-83. *BMW* makes this ratio an *ex post* tool of judicial review to determine whether the two damage awards generated by the jury bear a reasonable relationship to each other. In many states, this ratio is not treated as an *ex ante* consideration for the jury to take into account in generating the two damage awards. Nor, acting under instructions dictated by state law, will the jury necessarily consider or determine the amount of potential harm, which *BMW* also makes relevant to the ratio analysis.

Likewise, *BMW* requires a reviewing court to compare the punitive award to "the civil or criminal penalties that could be imposed for comparable misconduct." *Id.* at 583. Again, however, the jury does not necessarily hear evidence of "legislative judgments" concerning the appropriate sanctions for comparable conduct, *id.*, or receive instructions to conform its award to those judgments.

The magnitude of prior punitive awards in the jurisdiction also may affect the constitutional sufficiency of

the defendant's "notice" concerning potential punishment. *See id.* at 594-95 (Breyer, J., joined by O'Connor and Souter, JJ., concurring). Likewise, the existence of prior awards against the defendant for the same course of conduct may affect the need for additional punishment. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 22 (1991). Despite the significance of the prior awards to the constitutional issue of excessiveness, the jury generally does not hear evidence concerning prior awards and does not expressly consider the relationship between its award and the awards in other cases. *See, e.g., Bowden v. Caldor, Inc.,* 710 A.2d 267, 280-81 (Md. 1998); *Garnes v. Fleming Landfill, Inc.,* 413 S.E.2d 897, 909 (W. Va. 1991).

In short, an excessiveness challenge requires the trial court to undertake a new and independent inquiry into an issue of law. The court must consider factors as to which the jury may not have been instructed and may not have heard evidence. To be sure, in its legal analysis, the court *may* draw on factual evidence that was before the jury. However, the evidence at trial will have no bearing on other relevant legal factors, and the court's ultimate conclusion as to excessiveness is a legal ruling on an issue of constitutional law. There is no automatic relationship between the factors that state law directs the jury to consider in making the initial assessment of punitive damages and the factors that the reviewing court must apply in answering the constitutional question of excessiveness. *See, e.g., Bowden,* 710 A.2d at 285 (holding that "simply because a principle should be considered by the court in reviewing a punitive damages award for excessiveness does not mean that the same principle should give rise to an appropriate issue at the trial before the jury or an appropriate issue for a jury instruction"); *Garnes,* 413 S.E.2d at 909 ("We do not give all of the factors to the jury because the jury will not possess all of the information necessary to use the factors properly."); *cf. In re The Exxon Valdez,* 229 F.3d 790, 798-99 (9th Cir. 2000) (holding that jurors should not be informed of cede-back agreements or other "outside influence[s] that might lead them to inflate or reduce their damages award in order to 'secure justice' for the parties," because "a jury should assess damages but not determine how much defendants should 'actually' pay or how much plaintiffs should 'actually' receive").

The Oregon Court of Appeals has acknowledged the independence of the legal question before the reviewing courts and the factual issues before the jury. By supplying a constitutional standard of excessiveness, *BMW* made clear that "a reviewing court's determination of whether the punitive damage award is unconstitutionally excessive is not dependent on instructions to the jury or on the jury's considerations." *Blume v. Fred Meyer, Inc.,* 963 P.2d 700, 706 (Or. App. 1998). The court cannot ask exclusively "whether a rational nexus exists between the evidence and the amount the jury awarded," because the constitutional question requires analysis of factors that are outside of "the evidence." *Id.* at 705 (quotation omitted). For purposes of the inquiry into constitutional excessiveness, the reviewing court assumes that the jury acted "rationally" in light of the evidence before it and the "statutory and common law factors that the jury is instructed and permitted to consider" under the relevant state law. *MacCrone,* 980 P.2d at 1164, 1165 (quotation omitted). In other words, the constitutional inquiry assumes that a punitive award complies with applicable state law and asks whether the award nonetheless violates the federal Constitution. The *BMW* analysis requires "an independent assessment of the jury's award to determine whether it is constitutionally excessive." *Id.* at 1165.[2]

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[2] *See also Garnes,* 413 S.E.2d at 909 ("Because all of the information is not available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that the trial court will be required to adjust the award downward because of

It is clear, therefore, that this "independent assessment" under *BMW* involves a determination of law, not a determination or redetermination of factual questions. In *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 642 (10th Cir. 1996), the Tenth Circuit acknowledged that it "ascertain[ed] no error of law in the instructions to the jury, nor in the jury's factfinding." Nonetheless, the court held that the punitive award "was so excessive it violated the substantive element of the Due Process Clause." *Id.* As the court emphasized, far from engaging in factual second-guessing, it was deciding "a federal constitutional issue." *Id.*

B. Review for Constitutional Excessiveness Does Not Call for a Discretionary Determination.

The inquiry into constitutional excessiveness does not require appellate or trial courts to reconsider factual determinations of the jury. Nor does it ask the court to make a discretionary judgment about whether a new trial is warranted. Rather, the question is straightforward and legal: does the award violate the federal Constitution? If it does, the reviewing court has no discretion to look the other way. On the other hand, in the absence of a violation, the Constitution provides no basis to disturb the verdict. In either event, on the issue of excessiveness, the Constitution grants the reviewing court no "discretion" to abuse. Under these circumstances, review for abuse of discretion simply makes no sense.

Nonetheless, Respondent Leatherman suggests exactly that. Opp. Cert. at 10-11. This suggestion fundamentally misconceives the nature of the excessiveness inquiry. In *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), the Eleventh Circuit dispatched this suggestion in

information available to him or her that would have been prejudicial to the defendant if presented to the jury.").

the plainest terms: "*BMW* makes clear that there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture. The abuse of discretion standard is inapplicable where no discretion may be exercised." *Id.* at 1334.[3]

Leatherman relies on this Court's decision in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), but nothing in that decision requires a different result. Browning-Ferris waived any challenge to excessiveness under the Due Process Clause, *see id.* at 276-77, and sought to resurrect its unsuccessful Excessive Fines Clause argument in the guise of a federal common law challenge, *id.* at 277-78. This Court declined to create a federal common law standard of excessiveness and limited Browning-Ferris to its request for a new trial or remittitur under Fed. R. Civ. P. 59(a). *See id.* at 278-79.

It is well-settled that a motion for a new trial under Rule 59(a) is addressed to the district court's discretion to set aside a verdict that is supported by enough evidence to withstand a motion for judgment as a matter of law under Fed. R. Civ. P. 50, but that "appears . . . to be against the weight of the evidence." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (quotation omitted). It follows that appellate courts should review district courts' discretionary decisions regarding the weight of the evidence under Rule 59(a) "under an abuse-of-discretion standard." *Browning-Ferris*, 492 U.S. at 279. But it by no means follows that the same standard would govern a legal challenge under the Due Process Clause.

[3] *See also Bowden*, 710 A.2d at 277-78 ("Obviously . . . a trial court cannot properly leave in effect an award which exceeds constitutional limits."); H. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 782 (1982) ("In my view, [the appellate court's] reference to discretion was inappropriate" because the issue under review "was not a question where the trial judge has 'a limited right to be wrong'").

Browning-Ferris tied the abuse of discretion standard of review to the absence of any federal legal test for excessiveness, and to the nature of the challenge that Browning-Ferris raised. The Rule 59(a) motion in *Browning-Ferris* sought a discretionary decision, and the district court exercised its discretion by denying it. In light of the requested relief and the absence (at that time) of a federal substantive standard of excessiveness, abuse of discretion was the only conceivable standard of review for the court of appeals to apply.

BMW, however, changed all that. *BMW* supplied a substantive federal standard of excessiveness. *Cf. BMW*, 517 U.S. at 605 (Scalia, J., dissenting) (observing that the Court "establish[ed] federal standards governing the hitherto exclusively state law of damages"). After *BMW*, a punitive award either is, or is not, unconstitutionally excessive. There is no role for discretion in resolving that question of constitutional law. The trial court must make a legal determination in the first instance, and appellate courts must review that legal determination *de novo*. *See, e.g., Johansen*, 170 F.3d at 1334 ("The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*."); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 464 (3d Cir. 1999) ("[O]ur review is plenary."); *MacCrone*, 980 P.2d at 1165 ("[W]e will make an independent assessment of the jury's award to determine whether it is constitutionally excessive in violation of due process under the *BMW* guideposts without regard to the trial court's reasoning.").

C. Under Both the Due Process and Excessive Fines Clauses, Excessiveness Is a Legal Determination that the Court of Appeals Should Review *De Novo*.

The ultimate determination of constitutional excessiveness is neither a finding of fact nor an exercise of discretion, but a legal determination. Accordingly, neither

clear error review nor abuse of discretion review applies. This Court's precedents make clear that in reviewing a legal determination on an issue of constitutional law, the federal courts of appeals apply a *de novo* standard of appellate review.

The question of whether a particular punitive damages award is excessive under the Due Process Clause closely resembles the question of whether a particular fine is excessive under the Eighth Amendment's Excessive Fines Clause. *Cf. Browning-Ferris*, 492 U.S. at 277 n.23. Both questions arise *after* the factfinder has imposed a monetary sanction. Both questions require a legal conclusion on an issue of constitutional law, even if the court draws on factual determinations to reach its ultimate legal conclusion. Both questions assume that the monetary assessment complies with the applicable law, but require a determination whether the assessment nonetheless is constitutionally excessive. Both questions require courts to give content to the Constitution's legal standard of excessiveness.

In *Bajakajian, supra*, this Court squarely held that the court of appeals should review *de novo* a district court's legal conclusion concerning an Eighth Amendment excessiveness challenge. Rejecting a call for abuse of discretion review, the Court explained that "the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." 524 U.S. at 336 n.10.

The same *de novo* standard of appellate review should apply to the inquiry into the constitutional excessiveness of punitive damages. The two tests of constitutional excessiveness demand the same standard of appellate review. As with the Excessive Fines Clause issue, "the question of whether a [punitive damages award] is constitutionally excessive calls for the application of a constitutional

standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Id.*

Bajakajian illustrates that *de novo* review represents the norm when it comes to appellate review of ultimate determinations of constitutional law. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 691 (1996) ("We hold that the ultimate questions of reasonable suspicion and probable cause . . . should be reviewed *de novo*."); *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (holding that "the 'ultimate constitutional question' of the admissibility of a confession [is] a 'mixed questio[n] of fact and law' subject to plenary federal review") (citation omitted).[4] There is no reason to depart from this norm and to provide less than *de novo* review to potential due process violations caused by excessive punitive damages.

This Court implicitly recognized the need for *de novo* review in *BMW*. Although the Court did not expressly address the standard of appellate review, its searching analysis of the constitutional propriety of the award defies any characterization other than *de novo*. *See, e.g.*, 517 U.S. at 584 (requiring consideration of "less drastic remedies"); *id.* at 596 (Breyer, J., concurring) (approving "this Court's detailed examination of the award"); *id.* at 600 (Scalia, J., dissenting) (criticizing the majority for "decid[ing] anew a matter of 'reasonableness' resolved in lower court

[4] The standard of appellate review does not turn on the precision of the legal rule or standard applied as a matter of substantive constitutional law. For example, even in the obscenity context when the constitutional standard had little more legal content than "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), this Court rejected the "appealing" suggestion that the constitutional issue be treated as one of fact and held that it could not "avoid making an independent constitutional judgment on the facts of the case." *Id.* at 187, 190 (opinion of Brennan, J.). *See also Miller v. California*, 413 U.S. 15, 25 (1973) (holding that "First Amendment values . . . are adequately protected by the ultimate power of appella[t]e courts to conduct an independent review of constitutional claims when necessary").

proceedings"). The Court nowhere spoke of deference or discretion, and it expressed its ultimate conclusion in plainly legal terms: "we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit." *Id.* at 585-86.

The strong interest in uniformity of results provides an additional reason why *de novo* review of excessiveness determinations is particularly important. Like "the legal rules for probable cause and reasonable suspicion" at issue in *Ornelas*, the legal rules announced in *BMW* will "acquire content only through application." *Ornelas*, 517 U.S. at 697. The *Ornelas* Court's conclusion applies with equal force here: "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.*; *see also Fenton*, 474 U.S. at 114 (stressing the importance of "a federal appellate court['s] . . . primary function as an expositor of law" in contexts where "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case").

If the nascent standards of constitutional excessiveness laid out in *BMW* are to provide meaningful legal guidance, appellate courts must "maintain control of, and . . . clarify, [those] legal principles" by applying them to varying fact situations. *Ornelas*, 517 U.S. at 697. For all issues of constitutional law, appellate review plays a critical role in converting legal standards into predictable legal rules. *See, e.g., id.* But this critical role of appellate review takes on special importance in the context of an excessiveness test that stems from the Due Process Clause's requirement of fair notice. The standards laid down in *BMW* will not fulfill the goal of providing constitutionally sufficient notice if determinations of excessiveness are left to juries or trial courts. *De novo* appellate review will allow courts to develop the *BMW* factors based on experience with a wide variety of cases. Appellate courts can develop meaningful rules concerning, for example, the gradations within the

constitutional concept of reprehensibility and concerning what constitutes comparable conduct for purposes of comparing other civil and criminal penalties.

The special dangers posed by punitive damages also counsel in favor of *de novo* appellate review. As this Court has recognized, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). The "wide discretion" wielded by juries "creates the potential" for biased verdicts. *Id.* These dangers heighten the need for "appellate review [that] makes certain that the punitive damages are reasonable." *Haslip*, 499 U.S. at 21. Appellate courts cannot deliver on that promise without engaging in *de novo* review of the legal issue of excessiveness.

De novo review likewise provides an independent check in cases in which trial-court errors may have contributed to a questionable punitive award. In such cases, the trial judge may be reluctant to reduce the jury's award and may view an excessiveness challenge as an attempt by the defendant to introduce a previously-rejected legal argument through the back door. In other cases, a long trial may give the trial judge a vested interest in the jury's verdict. Phenomena such as these may help explain one trial court's recent decision to let stand a $144 billion punitive damages award. *See* G. Fairclough & M. Geyelin, *Florida Judge Upholds Award in Tobacco Case*, Wall St. J. (Nov. 7, 2000) at A3. In any event, *de novo* review provides a critical independent check on trial judges who may be reluctant to disturb the excessive award. The nature of punitive damage awards and experience with those awards counsel in favor of providing an independent review of the ultimate constitutional issue of excessiveness.[5]

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[5] *See also Fenton*, 474 U.S. at 114 (suggesting that "independent . . . appellate review" could be justified "as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor . . .'") (citations omitted).

II. *DE NOVO* REVIEW DOES NOT REQUIRE IGNORING THE JURY'S AND THE TRIAL COURT'S SUPERIOR ACCESS TO THE EVIDENCE

A. Findings of Fact Actually Made by the Jury or by the Trial Court Should Be Reviewed Deferentially.

As explained above, the trial court's legal conclusion concerning the constitutionality of a punitive award should be reviewed *de novo*, like other issues of constitutional law. However, this conclusion begins, rather than ends, the description of how the court of appeals should conduct its review. *De novo* review of the ultimate legal issue does not imply that the court of appeals should disregard the jury's or the trial court's superior ability to make credibility judgments and to assess the evidence presented at trial. In this context as elsewhere, "[t]he standard of review that [the appellate court] appl[ies] depends upon the particular challenge asserted." *Inter Medical Supplies*, 181 F.3d at 464. To the extent an appellant challenges the trial court's ultimate legal determination, a *de novo* standard should apply. However, if an appellant challenges the findings of fact underlying the legal conclusion, the court of appeals will review those findings of fact deferentially.

The Court made this point clear in *Bajakajian*. At the same time that it held that the legal question of excessiveness required *de novo* review, the Court also acknowledged that "[t]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous." 524 U.S. at 336 n.10; *see also Fenton*, 474 U.S. at 112 (distinguishing between the constitutional question of voluntariness and "subsidiary factual questions"). Although *Bajakajian* did not involve a jury's verdict, findings of fact made by a jury (for example, in responding to special interrogatories), rather than by the trial judge, also must be reviewed deferentially.

Once again, there is no reason for a different conclusion when the review for constitutional excessiveness stems from the Fifth and Fourteenth Amendments, rather than the Eighth. To the extent that a challenge implicates the factual findings underlying the trial court's legal conclusion concerning excessiveness, those findings "must be accepted unless clearly erroneous." *Bajakajian*, 524 U.S. at 336 n.10; *see, e.g., Johansen*, 170 F.3d at 1334 (holding that excessiveness must be reviewed *de novo*, but that "[i]n performing this review, however, we shall accept the district court's findings of fact unless they are clearly erroneous").

B. *De Novo* Review of the Legal Issue of Excessiveness Coupled With Deference to Subsidiary Factual Findings Promotes Careful Judicial Decision-Making.

Clarifying that appellate courts should review the ultimate legal determination of excessiveness *de novo*, while respecting subsidiary factual findings actually made by the jury or the trial court, will encourage careful judicial decision-making. This standard of review provides the district court with a compelling incentive to ensure that the facts upon which its constitutional assessment turns are expressly articulated, either in the jury's answers to special interrogatories or in a written opinion. Such express findings, in turn, will facilitate judicial review. Clear factual findings assist the courts of appeals in developing legal principles of general application concerning the constitutional issue of excessiveness.[6]

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[6] Indeed, several appellate courts have held that the trial court is *required* to record the reasons supporting its disposition of an excessiveness challenge. *See, e.g., Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed sub nom. Searle v. Morgan*, 510 U.S. 1033 (1994); *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991); *Garnes.*, 413 S.E.2d at 910.

For example, where the plaintiff claims that punitive damages are appropriate on more than one ground (*e.g.*, because the defendant sold a product knowing it was defective and because the defendant discovered the defect and knowing failed to issue a post-sale warning), the trial court should submit special interrogatories to ensure that the reviewing courts know which facts formed the basis of the jury's award. Further, if there is evidence in the record upon which the trial court relies in evaluating the reprehensibility of the defendant's conduct – such as when the defendant discovered the defect – the trial court should note that evidence in its opinion and explain how it affects the award's constitutionality. Such findings allow both trial and appellate courts to develop meaningful legal principles about the constitutional limits on punitive damages.

Likewise, where the trial court relies upon evidence concerning the impact of the defendant's conduct within the relevant jurisdiction, the amount of profit derived from that conduct, or other relevant factors, *see BMW*, 517 U.S. at 572-74; *id.* at 591 (Breyer, J., concurring), the trial court should detail that factual evidence in its opinion. The trial court also should note its findings concerning factors that are not reflected in the evidence at trial, such as civil and criminal sanctions for comparable conduct and prior punitive awards. *See id.* at 583-85; *see also Garnes*, 413 S.E.2d at 909-10 (discussing other factors not brought before the jury).

Those factual findings will guide the trial court's legal analysis. Depending on the issues that are relevant or contested in the particular case, the court should discuss matters such as how the level of reprehensibility compares to the award; why the punitive award bears a reasonable relationship to the compensatory award or the potential harm; what comparable conduct determines the relevant civil and criminal penalties to use as benchmarks; and how the award compares to those benchmarks.

Such an opinion would provide a solid base of factual findings which the court of appeals would disturb only if they were unsupported by the evidence (in the case of facts found by the jury) or clearly erroneous (in the case of facts found by the trial court). It would also provide an extensive legal analysis that would inform the appellate court's *de novo* legal review. In addition to ensuring careful review at the trial level, thorough analysis and explanation by the district courts will greatly facilitate the appellate courts' task. Rather than confronting the product of a decisional black box – as happened here – the appellate court will have the benefit of both the relevant factual findings and the district court's legal analysis. If the appellate court takes a different view on the legal issue, it will provide clear direction for litigants and trial courts when they confront similar factual patterns. Even if such comprehensive analysis increases the burden on the district courts, this Court has emphasized the critical importance of independent judicial review when constitutional rights are at stake. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 & n.50 (1982).

III. PROPOSALS TO APPLY *DE NOVO* REVIEW IN THE LIGHT MOST FAVORABLE TO THE JURY'S VERDICT MISCONCEIVE THE NATURE OF THE CONSTITUTIONAL INQUIRY UNDER *BMW* AND THE ISSUE BEFORE THIS COURT

In their brief at the certiorari stage, *Amici* Professors Chemerinsky and McEvoy submit that the court of appeals should review the district court's excessiveness determination *de novo*, but in doing so should view the evidence in the light most favorable to the verdict. This suggestion misconceives the nature of *BMW*'s constitutional inquiry, the issue before this Court, and the meaning of *de novo* review.

A. Neither the Trial Court Nor the Court of Appeals Should Defer to "Findings of Fact" Not Actually Made By The Jury.

Amici's suggestion that the courts should apply the excessiveness standard set forth in *BMW* in the light most favorable to the verdict overlooks the fact that the jury does not consider and the verdict does not reflect many legally relevant factors. *See supra* at 5-7; *Blume*, 963 P.2d at 705-06. According to *amici*, the court of appeals should "ask whether a rational factfinder could have rendered the award on the record and instructions given the jury." *Amici* Br. at 20. *Amici*'s premise is wrong both factually and legally. First, as a matter of fact, the jury in most cases is *not* the factfinder on all of the matters involved in the constitutional excessiveness inquiry. Under *BMW*, that inquiry requires consideration of factors that are *not* necessarily reflected in "the record and instructions given the jury." The notion of deferring to the jury's verdict on matters that the jury did not consider makes no sense.

As discussed *supra*, courts have recognized that the analysis of excessiveness under the Due Process Clause does not simply duplicate the task assigned to the jury. *See, e.g., Harris v. Soley*, 756 A.2d 499, 508-10 (Me. 2000); *MacCrone*, 980 P.2d at 1164-65; *Blume*, 963 P.2d at 705-06; *Garnes*, 413 S.E.2d at 909-10. This difference dooms *amici*'s suggested analogy to *Jackson v. Virginia*, 443 U.S. 307 (1979).

In *Jackson*, the habeas petitioner claimed that the jury heard insufficient evidence to support his conviction for first-degree murder. As with any other situation where a litigant asks a reviewing court to *revisit the precise question that the jury considered* and to conclude that there is insufficient evidence to support the jury's finding, deference was appropriate. This Court held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. As the Court explained, this "light most favorable" standard was required to "preserve[ ]" the jury's "role as weigher of the evidence." *Id.* The jury's role was at stake in *Jackson* because the defendant asked the reviewing court (on collateral review, no less) to reconsider the *precise question* put before the jury. That is not the case here. The jury is asked to make an initial assessment of punitive damages based on applicable *state* law. The reviewing court then asks *an analytically separate question* – a question that does not even arise until the jury makes its initial assessment – about whether the jury's award comports with *federal* due process requirements.[7]

More fundamentally, *amici*'s proposed standard misconstrues the relevant legal question under *BMW*. Under *BMW*, it makes no sense to "ask whether a rational factfinder could have rendered the award on the record and instructions given the jury." *Amici* Br. at 20. The *BMW* analysis *assumes* that a rational jury not only *could* have rendered the award consistent with the record and proper legal instructions, but that the jury *did in fact* render an award that is perfectly consistent with the record and applicable state law. Indeed, if there is any question whether the award comports with the record and instructions or otherwise complies with the applicable state law, courts should address those issues first by reducing or vacating the award under state law pursuant to basic principles of constitutional avoidance. *BMW* instead asks a court to determine whether a punitive damages award that fully complies with state law nonetheless violates the federal Constitution. In other words,

[7] For these reasons, *amici*'s criticism of the Eleventh Circuit's analysis in *Johansen* is unfounded. *Amici* take that court to task for failing to defer "to the factfinder on the case, *that is, the jury*," *Amici* Br. at 13 (emphasis added and other emphasis omitted), but *amici* overlook the fact that the jury did not decide many of the issues that *BMW* required the Eleventh Circuit to consider.

BMW assumes that the jury did its job properly under state law. Additional deference to the jury has no place in the constitutional analysis.

B. *Amici*'s Proposed Standard Conflicts With *BMW* and Is Beyond the Question Before the Court.

Amici's suggestion that courts should review punitive damage verdicts in the light most favorable to the verdict ignores not only the nature of *BMW*'s review of excessiveness, it also misconceives the issue before this Court. This Court granted *certiorari* limited to the following question: "What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?" *Amici*'s "light most favorable" argument conflates the test that *both* trial and appellate courts apply to judge the constitutionality of the jury's award and the question before this Court: the proper standard for an appellate court in reviewing a trial judge's determination concerning excessiveness. *Amici*'s suggestion that all reviewing courts – trial and appellate – apply a "light most favorable" standard would amend the substantive standard this Court adopted in *BMW*.

BMW supplies the substantive law for both trial and appellate courts to apply in judging the excessiveness of a punitive award. *BMW* mandates a searching review of the verdict and makes relevant a number of factors that were not before the jury. Accordingly, the jury's verdict is not generally entitled to deference. Of course, if the jury makes specific factual findings relevant to the punitive damages assessment, such as a finding of the defendant's net worth on a special interrogatory, that finding should be reviewed deferentially. But the ultimate constitutional question of excessiveness remains a legal issue for the trial judge, not for the jury. To suggest, as *amici* do, that trial and appellate courts should review the overall punitive damage award – as opposed to subsidiary factual questions – in the light most

favorable to (and with every reasonable inference drawn in favor of) the verdict is to suggest that courts review punitive damage awards with a thumb on the scales tipping them in the direction of approving the award.

That suggestion is inconsistent with *BMW*. As *amici*'s brief makes clear, applying their proposed standard makes the ultimate question of excessiveness come down to the award's rationality. *See, e.g., Amici* Br. at 4 (asking whether award "seem[s] rational"); *id.* at 5 (asking "whether the amount of the award is rational"); *id.* at 6 (asking whether the "amount of the punitive damages award is irrationally excessive"); *id.* at 7 (asking whether award "exceeds any *rational* appraisal of the punitive damages") (internal quotations omitted; emphasis in original). *BMW*, however, requires a reviewing court to go well beyond merely confirming that an award is rational. Indeed, an award that failed *amici*'s rationality test presumably would violate state-law standards, and so the courts would never reach *BMW*'s constitutional inquiry. In short, *amici*'s proposed standard, which like *BMW* would apply in trial and appellate courts alike, would require this Court to reconsider *BMW*.

However, this case does not implicate the substantive standards adopted in *BMW*. Rather, it involves only the procedural question of how the appellate court should review the trial court's *BMW* analysis. The question of the appellate standard of review is distinct from the substantive test that both trial and appellate courts should apply. *See, e.g., Honda*, 512 U.S. at 435-36 (Scalia, J., concurring); *cf. Gasperini*, 518 U.S. at 464-65 (Scalia, J., dissenting). Accordingly, *amici*'s standard is both contrary to *BMW* and beyond the scope of the question before this Court.

For purposes of that question, the important point is that – whatever the exact content of the legal standard the district court should apply to judge the constitutionality of a verdict – the district court applies a *legal* standard and makes a *legal* determination. Appellate courts should review that legal

determination, like rulings on other issues of constitutional law, *de novo*. *See, e.g., Johansen*, 170 F.3d at 1334 ("The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*.").[8]

IV. THE RE-EXAMINATION CLAUSE POSES NO OBSTACLE TO *DE NOVO* APPELLATE REVIEW

The Seventh Amendment limits judicial re-examination of "fact[s] tried by a jury." For at least two reasons, this provision does not preclude the courts of appeals from reviewing district courts' legal determinations concerning constitutional excessiveness under a *de novo* standard of review. First, as explained below, the amount of punitive damages is not a "fact tried by a jury" within the meaning of the Re-Examination Clause. Therefore, the Seventh Amendment does not limit the review of punitive damage awards. Second, even if the Clause has some application to punitive damages review, it obviously does not prevent appellate review of errors of law. A court does not engage in forbidden "re-examination" of any "fact tried by a jury" when it confronts the legal issue of an award's consistency with the Constitution.

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[8] As a result of the logical distinction between the substantive legal standard for judging excessiveness and the procedural standard of appellate review, any doubts about the validity or sufficiency of the *BMW* guideposts have no bearing on the proper standard of appellate review. *Cf. Honda*, 512 U.S. at 435-36 (Scalia, J., concurring) (joining the majority's decision holding that procedural due process required judicial review of a punitive damage award based on the existence of substantive excessiveness standards under Oregon law). This case takes the substantive standard as a given and asks only about the proper standard of appellate review. Concerns about the appropriateness of the substantive standard should not cloud the question of the proper standard of appellate review.

A. The Re-Examination Clause Does Not Limit Punitive Damages Review Because the Amount of Punitive Damages Is Not a "Fact Tried By a Jury" Under the Seventh Amendment.

In *Gasperini*, Justice Scalia observed that "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." 518 U.S. at 459 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (internal citation omitted). While the other Members of this Court did not address this question in *Gasperini*, other courts have agreed with this observation. *See, e.g., Continental Trend Resources*, 101 F.3d at 643; *Bowden*, 710 A.2d at 288; *cf. Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996) ("The jury's determination of the amount of punitive damages, however, is not a factual determination about the degree of injury . . . .").

Punitive damages differ fundamentally from compensatory damages. The latter compensate the victim, presumably in full. The former – to put it bluntly – are a windfall to the plaintiff aimed at punishing or deterring the defendant. *See* Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damages Litigation*, 105 Harv. L. Rev. 1900, 1903 (1992). No plaintiff ever is "entitled" to punitive damages. Even where the plaintiff has satisfied the legal predicates for punitive damages, the jury need not award them. As the jury instructions approved by this Court in *Haslip* emphasized: "Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so." 499 U.S. at 6 n.1. *Accord Smith v. Wade*, 461 U.S. 30, 52 (1983); Restatement (Second) of Torts § 908 cmt. d (1979).[9]

[9] This is not to say that plaintiffs do not carry the burdens of establishing the availability to punitive damages and providing the jury with a basis

The corollary of this principle is that the jury does not resolve a factual issue within the meaning of the Re-Examination Clause by choosing the *amount* of punitive damages. For these reasons, it distorts reality to characterize the amount of punitive damages as a "fact" that is "tried" by the jury.[10]

B. The Constitutional Excessiveness Inquiry Involves a Question of Law that Does Not Implicate the Re-Examination Clause.

Even if the amount of punitive damages is considered a "fact tried by a jury," *de novo* appellate review of the constitutionality of an award does not violate the Re-Examination Clause. As discussed above, a court decides a question of law, not a question of fact, when it determines whether a punitive damages award exceeds the constitutional limits. *See supra* at 3-8. Although the Seventh Amendment restricts judicial re-examination of "fact[s] tried by a jury," the Amendment poses no obstacle to appellate consideration

to award a particular amount of punitive damages. Nonetheless, as many courts treat the jury's punitive award as the product of a black box, the award should not be treated as an ordinary "fact tried by a jury" for purposes of the Re-Examination Clause.

[10] While this Court has not confronted the question squarely, *dicta* in several cases suggest that the Seventh Amendment does not require jury determination of punitive damages at all. *See Tull v. United States*, 481 U.S. 412, 425-26 & n.9 (1987) (holding that the Seventh Amendment does not require jury determination of amount of civil penalty and declaring more broadly that "[w]e have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial"); *Curtis v. Loether*, 415 U.S. 189, 196 & n.12 (1974) (stating that "[w]e need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief" for purposes of the Seventh Amendment, and citing *Swofford v. B&W, Inc.*, 336 F.2d 406, 414 (5th Cir. 1964), which held that the Seventh Amendment did not require a jury trial on punitive damages in a patent infringement action)). *See generally* P. Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. Chi. L. Rev. 179 (1998).

of questions of law. Accordingly, whatever constraints the Seventh Amendment may impose upon weight-of-the-evidence review in traditional remittitur practice, *see Gasperini*, those constraints do not apply to an appellate court's review of the legal question of a punitive award's consistency with the Due Process Clause under *BMW*.

Before *BMW*, in the absence of an excessiveness objection founded upon a rule of constitutional law, challenges for excessiveness took the form of motions for a new trial or remittitur under Fed. R. Civ. P. 59(a). Such motions essentially sought a declaration that the jury's punitive damages award was against the weight of the evidence. The motions were addressed to the discretion lodged uniquely in the district court (as permitted at common law) to order a new trial if the verdict was against the weight of the evidence or would result in an injustice. A remittitur under this regime was "a substitution of the court's judgment for that of the jury regarding the appropriate award of damages." *Johansen*, 170 F.3d at 1331.

Such motions sought *reconsideration of the precise fact already found by the jury*. Accordingly, such motions implicated important Seventh Amendment concerns. Under Rule 59(a) and "the rules of the common law," U.S. Const. amend. VII, the district court alone enjoys a limited and discretionary authority to substitute its view for the jury's on a factual issue. Appellate review of remittitur and new trial orders, therefore, was limited to the deferential abuse of discretion standard. *See Gasperini*, 518 U.S. at 434-36, 438. This made sense both because a Rule 59 motion seeks reconsideration of a fact found by the jury, and because the motion is addressed to the trial court's discretion.

An excessiveness challenge under *BMW* is fundamentally different. A court confronted with such a challenge does not second-guess any "fact tried by a jury," but rather tests the verdict for compliance with a standard of substantive law that was not before the jury. Rather than

revisiting the jury's assessment of punitive damages under state law (as in a remittitur motion), *BMW* directs courts to ask a distinct legal question. Not surprisingly, the reviewing court evaluates many factors that the jury had no occasion to consider. In contrast to a remittitur motion, a reviewing court under *BMW* does not "simply determine[] how closely the jury verdict will be scrutinized for compliance with the instructions." *Id.* at 464-65 (Scalia, J., dissenting). Instead, the reviewing court assumes compliance with the instructions but asks whether there is a distinct defect under federal law. Unlike a remittitur, "[a] constitutional reduction . . . is a determination that the law does not permit the award." *Johansen*, 170 F.3d at 1331; *accord Continental Trend Resources*, 101 F.3d at 642-43.

As the Eleventh Circuit explained, a finding of excessiveness under the Due Process Clause therefore involves no discretion and no re-examination of jury findings. Instead of ordering a new trial or remittitur under Rule 59(a), "a court proceeds under Rule 50 . . . in the entry of judgment for a constitutionally reduced award and the Seventh Amendment is not implicated in this legal exercise." *Johansen*, 170 F.3d at 1331. Under *BMW*, the defendant does not seek to reduce the award as against the weight of the evidence or to invoke the trial court's discretion. Instead, the defendant seeks to have the award reduced because it is excessive as a matter of law. "A constitutionally reduced verdict, therefore, is really not a remittitur at all." *Id.*[11]

Nothing in *Gasperini* casts any doubt upon an appellate court's power to enforce substantive legal limits, even with respect to *compensatory* damage awards (which are factual determinations governed by the Re-Examination Clause). The Court recognized that the Seventh Amendment limits

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[11] *Amici* fail to recognize that "a new trial motion" under Rule 59(a) is *not* "the device used to challenge the size of a jury's damage award" under *BMW*'s constitutional standard. *Amici* Br. at 4. This failure may explain why *amici* have proposed a standard that conflicts with *BMW*.

procedural innovations that intrude on the jury's province, such as the New York statute there at issue, but *Gasperini* in no way suggests that the Seventh Amendment somehow freezes substantive law or strips appellate courts of their ability "to maintain control of, and to clarify, the legal principles" through "[i]ndependent review."[12] *Ornelas*, 517 U.S. at 697. If, for example, a state expressly limited the recovery of awards for pain and suffering, the Re-Examination Clause would not prevent a federal court of appeals from reversing a compensatory damage award that explicitly included improper compensation for pain and suffering. Indeed, *Gasperini* observed that federal courts have found no Seventh Amendment obstacle to the application of state-law caps on compensatory damages. 518 U.S. at 429 n.9; *see also Southern R. v. Bennett*, 233 U.S. 80, 87 (1914) (distinguishing between excessiveness "as matter of law" and "upon the evidence"); *New York, L.E. & W.R. Co. v. Estill*, 147 U.S. 591 (1893).

Bajakajian likewise demonstrates the distinction between forbidden re-examination of facts tried by the jury and permissible independent consideration of questions of law. In *Bajakajian*, this Court did not re-examine the finding that the full amount of the currency was "involved in" the offense and therefore forfeitable under the statute, *see* 524 U.S. at 325-26. Instead, the Court addressed the distinct question of whether forfeiture of that full amount was unconstitutionally excessive. To be sure, the Re-Examination Clause was not

[12] Rather than condemning appellate review of questions of substantive law, *Gasperini* viewed the New York statute at issue as a partially procedural/partially substantive hybrid, which assigned appellate courts the primary responsibility for policing compensatory damages awards on factual grounds. *See* 518 U.S. at 431-32. Accordingly, the Court struck a compromise that allowed the federal district courts to apply the New York standard, while the courts of appeals reviewed those decisions as they would remittiturs. Nothing in *Gasperini*, however, suggests that there is any obstacle to federal courts imposing purely substantive legal limits on damage awards.

implicated there because Mr. Bajakajian had waived his right to a jury trial on the "involved in" issue. *See id.* at 325. But the Re-Examination Clause also was not implicated for the more fundamental reason that the relevant constitutional excessiveness test does not require the re-examination of any fact found by the jury. In sum, an appellate court simply does not re-examine a factual finding when the court considers whether a judgment is consistent with the Constitution.

CONCLUSION

For the foregoing reasons, and those expressed in Petitioner's Brief, this Court should reverse the judgment below.

Respectfully submitted,

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December 4, 2000

APPENDIX

APPENDIX A

CORPORATE MEMBERS, PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Altec Industries
American Home Products Corporation
American Medical Systems, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Andrx Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Aventis Pharmaceuticals
BASF Corporation
Baxter International, Inc.
Bayer Corporation
BIC Corporation
Biomet, Inc.
Biro Manufacturing Company Inc.
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Bobcat Company
Boeing Company, The
Bombardier Recreational Products
BP Amoco Corporation
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Brown and Williamson Tobacco
Brown-Forman Corporation
Budd Company, The
C. R. Bard, Inc.
Caterpillar, Inc.

Chevron Corporation
CLARK Material Handling Company
Coleman Company, Inc., The
Compaq
Continental General Tire, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Dow Chemical Company, The
E. & J. Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Euclid Hitachi Heavy Equipment, Inc.
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner Corporation
Gates Corporation, The; The Stant Corporation
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant
Harley-Davidson Motor Company
Harsco Corporation, Gas & Fluid Control Group
Heil Company, The
Henkel Corporation
Honda North America, Inc.

Hyundai Motor America
International Paper Company
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods, Inc.
Lucent Technologies Inc.
Mack Trucks, Inc.
Makita USA, Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Monsanto Company/G.D. Searle & Co.
Motor Coach Industries International, Inc.
Niro Inc.
Nissan North America, Inc.
O. F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Polaris
Porsche Cars North America, Inc.
Procter & Gamble Co., The
Raymond Corporation, The
Raytheon Aircraft Company

Rheem Manufacturing
RHI Refractories America
RJ Reynolds Tobacco Company
Rover Group, Ltd.
Schindler Elevator Corp.
SCM Group USA, Inc.
Sears, Roebuck and Company
Shell Oil Company
Sherwin-Williams Company, The
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Synthes (U.S.A.)
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Visteon Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Wilbur-Ellis Company
Wilson Trailer Company
Yamaha Motor Corporation, U.S.A.

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No. 99-2035

In The

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

vs.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF GENERAL DYNAMICS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

General Dynamics Corporation is a leading supplier of sophisticated defense systems to the United States and its allies. It is headquartered in Falls Church, Virginia, and employs approximately 44,000 people.

Amicus has experienced the harmful effects of punitive damages awards imposed without meaningful judicial review. *Amicus* is particularly concerned about the problem exemplified by the present case, in which a multi-million dollar punitive award was affirmed on appeal without proper consideration of the due process protections this Court established in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

SUMMARY OF ARGUMENT

Petitioner's brief explains why appellate courts should apply the de novo standard of review when the constitutionality of a punitive damage award is challenged under *BMW*. The purpose of this brief is to demonstrate the need for some additional guidance on how that standard of review should be applied. "Standards of review necessarily intertwine with the merits of the actions they act upon; the stated tests often have meaning

[1] This brief was authored by the *amicus* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief.

only in their particular contexts despite sounding so similar." Steven Alan Childress & Martha S. Davis, Federal Standards of Review x (3d ed. 1999).

The Appendix to this brief compiles information about federal and state appellate cases in which (1) a defendant has challenged the constitutionality of a punitive damage award under *BMW*, and (2) the challenged award was $1 million or more. Review of the Appendix demonstrates that the vast majority of appellate courts are giving little or no weight to *BMW*'s third guidepost: comparison of the punitive award to statutory civil and criminal penalties for comparable misconduct. This Court explained in *BMW* that reviewing courts should accord "substantial deference" to statutory penalties because they constitute legislative determinations of the appropriate sanctions for misconduct. Only a minority of appellate courts are doing so. We urge this Court to emphasize the importance of de novo review of all three of the *BMW* guideposts, including the third.

Our study of the federal and state appellate cases also reveals that many courts are intermingling the *BMW* guideposts with state law factors, such as the defendant's wealth, that have little or nothing to do with the constitutional issue of fair notice. This reflects confusion of the federal constitutional issue with state law issues. We urge this Court to emphasize the importance of de novo review of the correct issue: fair notice.

STATEMENT OF THE CASE

Amicus hereby adopts and incorporates by reference the Statement of the Case set forth in Petitioner's Brief.

ARGUMENT

I.

THE VAST MAJORITY OF APPELLATE COURTS HAVE IGNORED OR MISAPPLIED *BMW*'S THIRD GUIDEPOST: COMPARISON OF THE PUNITIVE DAMAGE AWARD TO CIVIL AND CRIMINAL PENALTIES FOR COMPARABLE MISCONDUCT.

In *BMW of North America v. Gore, Inc.*, 517 U.S. 559, 574 (1996), this Court held that a state violated the Due Process Clause of the Fourteenth Amendment by imposing punitive damages without "fair notice not only of the conduct that will subject [the defendant] to punishment, but also of the severity of the penalty that [the] State may impose." This Court considered three "guideposts" in determining whether BMW had fair notice of the $2 million punitive damage award the Alabama courts had imposed in that case: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff; and (3) comparison of civil and criminal penalties for comparable misconduct. *See id.* at 574-83.

Explaining the rationale behind the third guidepost, this Court stated that appellate courts should " 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.' " *Id.* at 583. The inclusion of the third guidepost appears to be one of the most significant aspects of the *BMW* opinion. *See* Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in* BMW v. Gore, 75 N.C. L. Rev. 1084, 1112 (1997) (stating that the third guidepost, unlike the others, "adds a new tool to the toolchests of lower courts"); Sandra Wilhide, Note, BMW v. Gore: *Curbing Excessive Punitive Damages*, 19 U. Haw. L. Rev. 311, 337 n.207 (1997) (observing that statutory penalties were not traditionally considered before *BMW*: "Until now such comparisons have been rejected").

Unfortunately, since *BMW*, most appellate courts have not accorded substantial deference, or any deference for that matter, to legislative judgments concerning the appropriate sanctions for misconduct.

The Appendix to this brief lists the federal and state appellate cases involving challenges to the constitutionality under *BMW* of a punitive damage award of $1 million or more.[2] As the Appendix reveals, 38 percent of these cases (23 out of 61) did not even state whether legislatively established penalties existed for comparable misconduct, let alone accord these penalties substantial deference. Another 26 percent (16 out of 61) stated whether statutory penalties existed, but nevertheless

[2] Cases involving less than $1 million have not been included simply to keep the Appendix manageable.

chose to ignore them for a variety of reasons discussed below.

Many appellate courts, like the Ninth Circuit in the case at bar, have upheld seven figure punitive awards against constitutional attack under *BMW* without even mentioning the third guidepost. *See, e.g., Morse v. S. Union Co.*, 174 F.3d 917, 926 (CA8 1999); *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 504-05 (CA8 1998); *EEOC v. HBE Corp.*, 135 F.3d 543, 556-57 (CA8 1998); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1253-54 (CA10 2000); *Klein v. Grynberg*, 1997 WL 643899, at *1 (CA10 1997) (unreported); *Prudential Ballard Realty Co., Inc. v. Weatherly*, ___ So.2d ___ [2000 WL 1038167, at *5] (Ala. 2000); *Notrica v. State Comp. Ins. Fund*, 83 Cal. Rptr. 2d 89, 114, 116-18 (Ct. App. 1999); *Owens-Corning Fiberglas Corp. v. Rivera*, 683 So.2d 154, 156 (Fla. Dist. Ct. App. 1996); *Bibb Distrib. Co. v. Stewart*, 519 S.E.2d 455, 459 (Ga. Ct. App. 1999); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 147-48 (Iowa 1996); *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So.2d 637, 646-47 (Miss. 1998); *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1053 & n.16 (Nev. 2000); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999).[3]

[3] Although we have limited the Appendix to cases involving punitive awards of $1 million or more, the problem discussed in this section is not limited to cases with large awards. Many appellate courts have affirmed awards under $1 million without discussing statutory penalties. *See, e.g., Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 993-94 (CADC 1998) (upholding $100,000 award without discussing statutory penalties); *Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240, 244-45 (Ark. 1998) (upholding $75,000 award without discussing statutory penalties); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 259, 261 (Ga. Ct. App. 1996) (upholding

In a number of cases, the Alabama Supreme Court has identified statutory penalties for comparable misconduct, but instead of according substantial deference to legislative judgment, has ignored the statutory penalties because they were perceived to be too low, *see, e.g., Union Sec. Life Ins. Co. v. Crocker*, 709 So.2d 1118, 1122 (Ala. 1997); *Ford Motor Co. v. Sperau*, 708 So.2d 111, 122 (Ala. 1997); *Life Ins. Co. of Ga. v. Johnson*, 701 So.2d 524, 531 (Ala. 1997); *BMW of N. Am., Inc. v. Gore*, 701 So.2d 507, 514 (Ala. 1997), or because statutory penalties were not sought or assessed against the defendant, *see Lance, Inc. v. Ramanauskas*, 731 So.2d 1204, 1219 (Ala. 1999); *see also Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 507 (S.D. 1997).

Some courts, instead of looking at comparable statutory penalties, have looked only at verdicts or judgments in similar cases. *See, e.g., Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 445 (CA6 2000) ("Finally, the third factor provides little guidance in this determination as the parties have provided no evidence of similar jury verdicts on this issue."); *Harris v. Soley*, 756 A.2d 499, 509 (Me. 2000) ("We next review the difference between the award in this case and civil penalties authorized or awarded in other cases."); *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d

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$65,000 award without discussing statutory penalties); *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594-95 (Iowa 1999) (upholding $30,000 award without considering statutory penalties); *Garcia v. Coffman*, 946 P.2d 216, 224-25 (N.M. Ct. App. 1997) (upholding $50,000 award without discussing statutory penalties); *Bardonaro v. Gen. Motors Corp.*, 2000 WL 1062188, at *5-*6 (Ohio Ct. App. 2000) (unreported) (upholding $100,000 award without discussing statutory penalties).

155, 177-79 (Mo. Ct. App. 1997) (acknowledging third guidepost but discussing only cases, not statutory penalties). *BMW* approved the consideration of judicial decisions, *see BMW*, 517 U.S. at 584, but not to the exclusion of statutory penalties. Otherwise, judicial decisions upholding excessive punitive damage awards can be used to justify one another.

Where there are no statutory penalties for comparable misconduct, some appellate courts have simply declared the third guidepost inapplicable, *see, e.g., Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 562-63 (Ind. Ct. App. 1999) ("In this case however there is no comparable civil statutory penalty. . . . The same is true for criminal penalties. Thus this portion of the *Gore* indicia of excessiveness is not applicable."); *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 445 (Miss. 1999) (disposing of third guidepost by stating "there are no other sanctions which would be imposed under the facts of this case"), rather than concluding that the absence of statutory penalties suggests the absence of fair notice.

In sum, it is apparent that the vast majority of appellate courts have ignored the third guidepost or given it short shrift. *Amicus* respectfully requests that this Court not only adopt the de novo standard of review, but emphasize that appellate courts must independently consider and analyze each of *BMW*'s three guideposts, including comparing the punitive award to statutory civil and criminal penalties for comparable misconduct.

II.

MANY APPELLATE COURTS HAVE DILUTED THE *BMW* GUIDEPOSTS BY INTERMINGLING STATE LAW FACTORS BEARING LITTLE OR NO RELATION TO FAIR NOTICE.

Many appellate courts, when faced with a challenge to the amount of a punitive damage award under *BMW*, have reviewed the award by combining the *BMW* guideposts with the factors considered when reviewing punitive damage awards under state law. *See, e.g., Morse v. S. Union Co.*, 174 F.3d 917, 926 (CA8 1999) (combining *BMW* guideposts with factors considered under Missouri law); *Lance, Inc. v. Ramanauskas*, 731 So.2d 1204, 1218-21 (Ala. 1999) (combining *BMW* guideposts with factors considered under Alabama law); *Notrica v. State Comp. Ins. Fund*, 83 Cal. Rptr. 2d 89, 114, 116-18 (Ct. App. 1999) (combining *BMW* guideposts with factors considered under California law); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561-64 (Ind. Ct. App. 1999) (combining *BMW* guideposts with factors considered under Indiana law); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 147-48 (Iowa 1996) (combining *BMW* guideposts with factors considered under Iowa law); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 277-86 (Md. 1998) (combining *BMW* guideposts with factors considered under Maryland law); *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 444-45 (Miss. 1999) (combining *BMW* guideposts with factors considered under Mississippi law); *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 177-80 (Mo. Ct. App. 1997) (combining *BMW* guideposts with factors considered under Missouri law); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999) (disposing of due process argument and state law excessiveness

argument in a single paragraph, citing only Oregon law); *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 504-08 (S.D. 1997) (combining *BMW* guideposts with factors considered under South Dakota law); *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678, 692 (W. Va. 1997) (combining *BMW* guideposts with factors considered under West Virginia law).[4]

Intermingling state law factors with the *BMW* guideposts is improper analysis. This Court made clear in *BMW* that the three guideposts are designed to help a reviewing court determine the maximum amount of punitive damages a state can impose without denying a defendant's right to due process. *See Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (CA11 1999) ("*BMW* makes clear that there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture.").

In contrast, state law tests for excessiveness are generally aimed at determining whether a punitive damage award is the result of passion and prejudice. *See, e.g., Lance, Inc.*, 731 So.2d at 1216; *Notrica*, 83 Cal. Rptr. 2d at 116; *Ford Motor Co. v. Ammerman*, 705 N.E.2d at 563; *Wilson*, 558 N.W.2d at 147; *Paracelsus Health Care Corp.*, 754 So.2d at 444; *Allsup's Convenience Stores, Inc. v. N.*

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[4] This intermingling helps explain why some appellate courts have applied the abuse-of-discretion standard of review. They have mixed the *BMW* test with state law, then cited a case or statute that provides for a deferential standard of review as a matter of state law. *See, e.g., Morse*, 174 F.3d at 925; *Wilson*, 558 N.W.2d at 147-48; *Barnett v. La Societe Anonyme Turbomeca Fr.*, 963 S.W.2d 639, 661 (Mo. Ct. App. 1997).

River Ins. Co., 976 P.2d 1, 9 (N.M. 1998); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 871 (Ohio 1998); *Grynberg*, 573 N.W.2d at 504.

Put simply, *BMW* asks whether a defendant had fair notice, while state law typically asks whether a reasonable jury could have imposed the amount in question. While the tests share some common elements, the ultimate determinations they seek to make are different.

For example, some courts that have intermingled state law factors with *BMW*'s guideposts have cited the defendant's ability to pay as a basis for upholding a punitive damage award. *See, e.g., Wilson*, 558 N.W.2d at 147-48; *Paracelsus Health Care Corp.*, 754 So.2d at 445; *Vandevender*, 490 S.E.2d at 692. Although many states provide that the defendant's wealth has a place in assessing the amount of punitive damages in the first instance, or in reviewing a punitive award for excessiveness, this Court made clear in *BMW* that a defendant's wealth has no bearing on whether a punitive award violates due process because the defendant lacked fair notice: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *BMW*, 517 U.S. at 585.

Amicus respectfully requests that this Court not only adopt the de novo standard of review, but emphasize that appellate courts must apply that standard to the correct issue: fair notice. State law factors having little or nothing to do with fair notice should not be fused with *BMW*'s guideposts.

CONCLUSION

For the foregoing reasons, *amicus* urges that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

Cases Challenging the Constitutionality Under *BMW* of a Punitive Award of $1 Million or More

Punitive Damages		**Ratio**	**Nature of Conduct**	**Comparable Statutory Penalties**	**Final Punitives**	**Final Ratio**
Verdict(s)	**After Tr. Court's Review**					
3d Circuit *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446 (CA3 1999)						
$100.6 M	$50 M	1.04	Unfair competition	$500,000 or $1.5 M; disregarded as unhelpful	$1 M	0.02
6th Circuit *Gregory v. Shelby County, Tenn.*, 220 F.3d 433 (CA6 2000)						
$2.2 M	Not known[1]	Not known	Civil rights violation (death)	Not discussed	$2.2 M	2.83

[1]Reduced, but amount of reduction not revealed by appellate opinion.

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
8th Circuit						
Morse v. S. Union Co., 174 F.3d 917 (CA8 1999)						
$6.25 M	$400,000	5.71	Employment discrimination	Not discussed	$400,000	5.71
Watkins v. Lundell, 169 F.3d 540 (CA8 1999)						
$3.5 M $117,500	Same	14.89 .50	Fraudulent inducement of contract	$10,000	$940,000 None	4 N/A
Denesha v. Farmers Ins. Exch., 161 F.3d 491 (CA8 1998)						
$4 M	None	N/A	Employment discrimination	Not discussed	$700,000	4.26
EEOC v. HBE Corp., 135 F.3d 543 (CA8 1998)						
$4.8 M (2 plaintiffs)	Same	42.61	Employment discrimination	Not discussed	$480,000	4.26

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Kim v. Nash Finch Co., 123 F.3d 1046 (CA8 1997)						
$7 M	Not known"	Not known	Employment discrimination	$300,000	$300,000	Not known
Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (CA8 1997)						
$50 M	$5 M	142.86	Sexual harassment	$300,000 (fed); disregarded as inapplicable to state law claim	$350,000	10

"The district court capped the judgment at $300,000, without allocating between compensatory and punitive damages.

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	After Tr. Court's Review					
9th Circuit *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241 (CA9 1998)						
$16.5 M	None	N/A	Insurance bad faith	$500,000	Vacated & remanded for recon-sideration	N/A
VisionQuest Nat'l, Ltd. v. Marimed Found., 1998 WL 416471 (CA9 1998) (unreported)						
$1.75 M	Same	3.19	Tortious breach of contract	Not discussed	$1.75 M	3.19
Guzman v. Tower Dev., Inc., 1997 WL 801449 (CA9 1997) (unreported)						
$4 M (2 plaintiffs)	Same	17.19	Fraud, conversion	Disregarded because no penalties found	$4 M	17.19

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	After Tr. Court's Review					
10th Circuit *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159 (CA 10 2000)						
$2.04 M	Same	12	Negligence	$30,000 and one year in prison (fed); $1,000 and revocation of license (state)	$2.04 M	12
Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (CA10 2000)						
$17.46 M	Same	1.78	Products liability (amputation)	Not discussed	$17.46 M	1.78
United Int'l Holdings, Inc. v. The Wharf (Holdings) Ltd., 210 F.3d 1207 (CA10 2000)						
$58.5 M	Same	0.87	Securities fraud	$2,500,000 (fed) and $750,000 (state)	$58.5 M	0.87

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Deters v. Equifax Credit Info. Servs., Inc., 202 F.3d 1262 (CA10 2000)						
$1 M	$295,000	59	Sexual harassment	$300,000	$295,000	59
FDIC v. Hamilton, 122 F.3d 854 (CA10 1997)						
$1.2 M	Same	27.27	Fraud	None; treated as mitigating factor	$264,000	6
Klein v. Grynberg, 1997 WL 643899 (CA10 1997) (unreported)						
$4 M (3 plaintiffs)	$600,000	150,000	Breach of fiduciary duty	Not discussed	$600,000	150,000
Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634 (CA10 1996)						
$30 M	Same	111.52	Interference with contract	"Very large"	$6 M	22.30

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
11th Circuit *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (CA11 1999)						
$45 M (15 plaintiffs)	$4.35 M	100	Pollution	$10,000	$4.35 M	100
Alabama *Prudential Ballard Realty Co., Inc. v. Weatherly*, ___ So.2d ___ [2000 WL 1038167] (Ala. 2000)						
$2.5 M	$1.25 M	5	Real estate fraud	Not discussed	$750,000	3
Lance, Inc. v. Ramanauskas, 731 So.2d 1204 (Ala. 1999)						
$13 M	Same	N/A [!!!]	Wrongful death	Disregarded because fines not sought or imposed	$4 M	N/A

[!!!]No compensatory damages allowed under state law.

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
McKowan v. Bentley, 1999 WL 667290 (Ala. 1999) (unreported)						
$2 M	Same	N/A [1]	Wrongful death	Disregarded because no penalties found	$2 M	N/A
Union Sec. Life Ins. Co. v. Crocker, 709 So.2d 1118 (Ala. 1997)						
$2 M	Same	123.28	Fraud	$2,000; disregarded because too low	$1 M	61.64
Ford Motor Co. v. Sperau, 708 So.2d 111 (Ala. 1997)						
$6 M (2 plaintiffs)	Same	3.55	Fraud	$2,000; disregarded because too low	$1.792 M	1.06

[1]No compensatory damages allowed under state law

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
BMW of N. Am., Inc. v. Gore, 701 So.2d 507 (Ala. 1997)						
$4 M	$2 M (after first appeal)	500	Fraud	$2,000; disregarded because too low	$50,000	12.5
Foremost Ins. Co. v. Parham, 693 So.2d 409 (Ala. 1997)						
$4.5 M $3 M $4.5 M $3 M	$2.5 M $750,000 $2.5 M $750,000	10,647 459.14 10,950 624.52	Fraud	$1,000	$114,500 $60,500 $112,500 $60,500	487.65 37.03 492.34 50.37
Arkansas *Edwards v. Stills*, 984 S.W.2d 366 (Ark. 1998)						
$1.5 M	Same	6.16	Assault, battery, false imprisonment	Life in prison	$1.5 M	6.16

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
California *Notrica v. State Comp. Ins. Fund*, 83 Cal. Rptr. 2d 89 (Ct. App. 1999)						
$20 M	Same	41.79	Insurance bad faith	Not discussed	$5 M	10.45
Florida *Langmead v. Admiral Cruises, Inc.*, 696 So.2d 1189 (Fla. Dist. Ct. App. 1997)						
$3.5 M	Same	3626.94	Personal injury (minor injury to eye)	None; treated as mitigating factor	None	N/A
Owens-Corning Fiberglas Corp. v. Rivera, 683 So.2d 154 (Fla. Dist. Ct. App. 1996)						
$1.5 M	Same	0.42	Products liability (asbestosis)	Not discussed	$1.5 M	0.42

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Mich. Mut. Ins. Co. v. Sports, Inc., 698 N.E.2d 834 (Ind. Ct. App. 1999)						
$1 M	Same	12.81	Insurance bad faith	$200,000	$1 M	12.81
Iowa *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996)						
$15 M	$100,000	25	Defamation, breach of fiduciary duty	Not discussed	$2 M	500
Maine *Harris v. Soley*, 756 A.2d 499 (Me. 2000)						
$1 M (4 plaintiffs)	Same	16.11	Intentional infliction of emotional distress, conversion	Not discussed	$1 M	16.11

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Maryland *Bowden v. Caldor, Inc.*, 710 A.2d 267 (Md. 1998)						
$9 M	$350,000	5.83	Malicious prosecution, defamation, false imprisonment	$1 M (maximum fine authorized by any Md. law)	Remittitur reversed, remanded for recon-sideration	N/A
Mississippi *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437 (Miss. 1999)						
$1.5 M $1.5 M	Same	42.73 150	Wrongful termination	Disregarded because no penalties found	$1.5 M $1.5 M	42.73 150
State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So.2d 637 (Miss. 1998)						
$1.25 M	Same	657.89	Insurance bad faith	Not discussed	$1.25 M	657.89

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Missouri *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. Ct. App. 1997)						
$67.5 M	Same	27	Wrongful death	Not discussed	$26.5 M	10.60
Barnett v. La Societe Anonyme Turbomeca Fr., 963 S.W.2d 639 (Mo. Ct. App. 1997)						
$175 M	$87.5 M	3.5	Wrongful death	Not discussed	$26.5 M	1.06
Nevada *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043 (Nev. 2000)						
$6 M	Same	2.31	Conversion	Not discussed	$6 M	2.31
New Mexico *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 976 P.2d 1 (N.M. 1998)						
$4 M $500,000	$1 M $100,000	1.85 20.87	Insurance bad faith	Revocation of license	$4 M $500,000	7.41 104.34

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Ohio *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546 (Ohio 1999)						
$25 M	$15 M	6250	Wrongful death	Prosecution for manslaughter	$15 M	6250
Williams v. Aetna Fin. Co., 700 N.E.2d 859 (Ohio 1998)						
$1.5 M	Same	100	Fraud	Not discussed	$1.5 M	100
Oregon *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999)						
$4 M	Same	.65	Products liability (brain damage and paralysis)	Not discussed	$4 M	.65

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Jensen v. Medley, 11 P.3d 678 (Or. Ct. App. 2000)						
$1.25 M	Same	35.71	Retaliation against whistleblower	$1,000 and one year in prison	$175,000	5
MacCrone v. Edwards Ctr., Inc., 980 P.2d 1156 (Or. Ct. App. 1999) (en banc)						
$1.25 M	$1 M	3.64	Intentional infliction of emotional distress	$7,000 and 18 months in prison	$1.25 M	4.55
Axen v. Am. Home Prods. Corp., 974 P.2d 224 (Or. Ct. App. 1999)						
$20 M	Same	8.31	Products liability (blindness)	$60,000 and injunction against future sales	$20 M	8.31

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Parrott v. Carr Chevrolet, Inc., 965 P.2d 440 (Or. Ct. App. 1998)						
$1 M	$50,000	4.35	Unlawful trade practices	Injunction against unlawful practices	$300,000	26.10
South Carolina *Welch v. Epstein*, ___ S.E.2d ___ [2000 WL 1056052] (S.C. Ct. App. 2000)						
$3.9 M	Same	1.29	Medical malpractice (death)	Not discussed	$3.9 M	1.29
Hundley v. Rite Aid of S. C., Inc., 529 S.E.2d 45 (S.C. Ct. App. 2000)						
$10 M $1 M	Same	2 5	Pharmacist malpractice (brain damage)	$500 plus revocation of license	$10 M $1 M	2 5

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
South Dakota *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493 (S.D. 1997)						
$4.8 M	Same	8.32	Fraud	$10,000 and 10 years in prison; disregarded because no charges sought	$1 M	1.73
Texas *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998)						
$4.35 M (4 plaintiffs)	$3.7 M	2.85 2.14 1.77 1.15	Products liability (asbestosis)	Disregarded because no penalties found	$3.7 M	2.85 2.14 1.77 1.15
N. Am. Refractory Co. v. Easter, 988 S.W.2d 904 (Tex. App. 1999)						
$1.5 M	$1.3 M	0.46	Products liability (asbestosis)	Disregarded because no penalties found	$1.3 M	0.46

Punitive Damages		Ratio	Nature of Conduct	Comparable Statutory Penalties	Final Punitives	Final Ratio
Verdict(s)	**After Tr. Court's Review**					
Harrison v. Querner, 2000 WL 4541 (Tex. App. 1999) (unreported)						
$1 M (2 plaintiffs)	Same	4.80	Fraud	Not discussed	$1 M	4.80
West Virginia *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678 (W. Va. 1997)						
$1.575 M $1.124 M	Same	5 15.59	Unlawful termination, retaliation	Disregarded because no penalties found	$1.109 M $1.124 M	5 15.59

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No. 99-2035

In The

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Alliance of American Insurers (hereinafter "Alliance") and the National Association of Independent Insurers (hereinafter "NAII") are the leading voices of the insurance industry. Together, these two trade groups represent over 700 insurance companies across the nation.

Property and casualty insurance companies of all types and size belong to the Alliance and NAII. Member companies range from small business enterprises that write insurance in only one state through insurers that conduct business nationwide. People from every walk of life, including students, families, small business owners, laborers, farmers, and professionals purchase insurance from Alliance and NAII member companies. Virtually every type of business or organization imaginable, from the neighborhood bakery to international corporations, also rely on these insurers for their expertise in investigating claims, mediating and settling disputes, and providing a legal defense in trial and appellate courtrooms across the country.

As the result of our daily interaction with our nation's courts and our relationships with our policyholders, we know firsthand that the American public treasures the judicial branch and we recognize the positive impact that the judicial branch has on society. *Amici*

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

are deeply concerned about the selection of the appropriate standard of review because the designation of the appropriate standard has the potential to strengthen or weaken the relationship between the judicial branch and society, particularly in those cases where punitive damage awards have been impermissibly upheld due to the absence of meaningful analysis.

SUMMARY OF ARGUMENT

Courts have used the appellate review process to shape our nation's fabric. To foster the legitimacy of "judicial review," courts have successfully utilized written opinions which explain in detail the issue presented, the reasoning applied, and the rationale used to arrive at their decisions. Indeed the vehicle of detailed written decisions illuminates the path for members of society to follow.

The de novo standard of review, delivered through the medium of a detailed written opinion, is of critical importance in punitive damage cases because:

(1) punitive damage decisions are meant to deter others from reprehensible and outrageous conduct; and

(2) detailed written opinions will continue to educate lower courts, litigants, and society at large of crucial constitutional considerations and will provide a better understanding of when an application of the *Gore* standards violates the Constitution.

If the standard of review used in punitive damage cases is minimized, then the objective of deterrence may be directly threatened and there becomes a real danger that ill-conceived or unconstitutional lower court rulings may become the foundation of future common law. Such an outcome will undermine the public's faith in the American judicial system because the initial error will have been allowed to stand.

Equally important, this Court's prominence has been elevated over time due to this Court's zealous defense of constitutional rights. This case presents a delicate question in that the Petitioner's rights were abridged by a component of the judicial system itself. In acknowledging that the Constitution and the rights afforded thereunder are supreme, this Court should adopt a de novo standard of review. This heightened standard of review will safeguard Petitioner's constitutional rights, continue the judiciary's tradition of zealously protecting fundamental rights, and further the judiciary's cherished status as the most respected institution Americans possess.

For the foregoing reasons, *Amici* respectfully request that this Court adopt the de novo standard of review in this case and rule in favor of Petitioner.

ARGUMENT

I. IN RESOLVING THE QUESTION PRESENTED, THE PUBLIC POLICY OBJECTIVE OF DETERRENCE FAVORS THE ADOPTION OF THE DE NOVO STANDARD OF REVIEW.

Punitive damage awards serve two primary objectives. The first is to punish the defendant for its act or omission. Second, punitive damage awards are calculated to prevent and deter the defendant from undertaking similar misconduct in the future. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). Thoughtful review of *Haslip* and other authorities reveals that the objective of deterrence applies not only to the named defendant, but is also intended to alert, prevent and discourage others from committing comparable misdeeds. Viewed in this context, punitive damage awards have an "outward deterrent effect" to guide business, commerce and our society as a whole. *Amici* now come before this honorable Court as a voice from that broader population.

Amici believe that the second objective, that of deterrence or prevention, come the closest to being met where the appellate court delineates the issues, reasoning, analysis and conclusions behind its decision. *See e.g. Johansen v. McGill*, 170 F.3d 1320 (11th Cir. 1999) (applying de novo standard of review); *Inter Medical Supplies, Inc. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3rd Cir. 1999) (applying de novo standard of review); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219 (10th Cir. 2000) (applying de novo standard of review). This approach is fundamental and well-recognized. *Amici* note that the federal appellate court stands in a unique position to

provide litigants, as well as the business community, the insurance industry, and the legal profession, with learned guidance, perspective and judicial insight. *Amici* believe this time proven framework is an efficient means to continue to meet those objectives. The public policy objective of outward deterrence requires the appellate court to explicate the substance of its constitutional analysis, so others may benefit from the court's wisdom.

Since their inceptions, the Alliance and NAII, for the benefit of their member insurance companies, have closely monitored rulings of appellate courts on a wide range of legal issues. One particular issue that has received considerable attention is the constitutional limit that applies to punitive damage awards. Indeed, members of the insurance industry have appeared directly before this Court on this very issue, at times as a party and at times as *Amici Curiae*. *See e.g. Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

The pronouncements from appellate court decisions are vital to the associations' member companies and to the individuals, organizations and companies our members insure. First, the industry strives to comprehend appellate court decisions on the award of punitive damages to ascertain the distinctions between permissible acts versus sanctionable conduct. More importantly, detailed written opinions using the de novo standard of review afford our member companies and their policyholders with a fuller understanding of their constitutional rights and protections. This information is vital in the investigation of claims and formulation of legal defenses for the policyholders our member companies insure. Similarly, the written opinions that address the nature of

sanctionable conduct, enable member companies to challenge and address questionable practices of their insureds, and assist our member companies in deciding whether to provide certain types of insurance coverage, where insurance coverage will be offered, and at what price insurance coverage will be afforded to customers.

Second, appellate opinions aid member insurance companies in assessing their potential financial exposures under insurance contracts sold to policyholders. *Amici* recognize that there is no bright line mathematical formula by which to ascertain the upper limit beyond which punitive damages may not go. In the absence of such a bright line test, it is critical to those we insure and to our member insurance companies that we continue to receive detailed and meaningful written opinions from appellate courts. This information allows us to better judge the totality of risks our policyholders and member companies face and to continue our future business practices in a manner consistent with the rule of law.

Third, appellate opinions on the topic of punitive damages are scrutinized for precedential value so that corporate counsels and boards of directors can assess possible exposures should the insurance company itself be named as a party defendant in litigation. Finally, insurers review appellate opinions on punitive damages to assess if they may be entitled to recover punitive damages when the insurer is a party plaintiff in litigation.

The information gleaned from appellate court decisions is conveyed to member insurance companies through a variety of means. Both the Alliance and the

NAII host educational seminars and forums where prominent members of the legal community are invited to address the membership about trends and developments in the law. Frequently, punitive damage issues are on the forefront of these discussions. Also, the Alliance and NAII both have formed committees that address specific topics relevant to the insurance industry. And again, the topic of punitive damages receives constant attention through the committee structure. Finally, the Alliance and NAII regularly inform their members about trends or changes in punitive damage jurisprudence through various publications, newsletters and electronic communications. The issue of punitive damage draws significant attention throughout the insurance industry. *Amici* cannot over-emphasize the significant attention that is paid to appellate court rulings on the issue of punitive damages.

Amici are concerned that the adoption of the abuse of discretion standard of review by this Court will foster and encourage appellate courts to provide cursory opinions that lack any meaningful guidance to our member companies and the entities they protect. If future appellate court decisions follow the abuse of discretion standard of review and mirror the exhibits appended in App. 24a and App. 3a-4a to Cooper's Petition, *Amici* are concerned that the lack of meaningful analysis will leave insurance policyholders and the remainder of society to speculate about what behavior will be subject to punitive damage awards. Blurring the nation's understanding of what behavior may be sanctioned defeats the deterrent effect that punitive damages are designed to foster. As such, *Amici* believe the abuse of discretion standard, as applied in this case, undermines the deterrent effect on

both the defendant and society. Worse yet, cursory opinions which are void of meaningful review, obfuscate the ability of litigants to comprehend and zealously assert their constitutional rights.

This effect is evident in the instant litigation. Appended to Petitioner's Petition For A Writ of Certiorari are the written opinions of the district court and the Ninth Circuit Court of Appeals on the due process issue. (See App. 24a and App. 3a-4a to Cooper Industries, Inc., Petition For A Writ Of Certiorari). The Ninth Circuit Court of Appeals applied the deferential abuse of discretion standard without any reference to the *Gore*[2] guideposts. Furthermore, the district court dedicated but one sentence to the *Gore* case. *Amici* assert that Ninth Circuit's cursory opinion affirming the district court's perfunctory constitutional analysis provides no deterrent effect whatsoever. *Amici* are gravely concerned that great harm and confusion will result from further application of the abuse of discretion standard of review in the punitive damage context. Indeed, the defects inherent in the abuse of discretion standard will thwart future application of the *Gore* guideposts, thus blurring the line at which punitive damage awards exceed constitutional rights.

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[2] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (three guideposts to determine whether a punitive damage award is unconstitutionally excessive are: (1) the reprehensibility of the behavior, (2) the disparity between the harm or potential harm suffered and the punitive damages award, and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Amici believe that the deterrence objective can only be achieved where an appellate court performs a detailed and meaningful review and analysis of the evidence that gives rise to the award. Where a litigant asserts that a punitive damage award imposed upon it is unconstitutionally excessive, *Amici* believe it is the solemn responsibility of the appellate court to provide stringent safeguards to ensure that constitutional limits on punitive damages have not been exceeded. The Constitution affords federal judges lifetime tenure. Our nation's founding fathers provided the judiciary with autonomy to ensure that the judiciary will fully explain their decisions when shaping the law. *Amici* agree with the Third Circuit Court of Appeals when it recognized its true responsibility and stated it is the appellate court's role to serve as the "gatekeeper in reviewing punitive damage awards." *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3d Cir. 1999). *Amici* fear that the absence of de novo review may perpetuate a trial court's unconstitutional ruling.

Thus, *Amici* urge this Court to reject the abuse of discretion standard and to adopt a standard of review that requires the appellate court to conduct a detailed appraisal of the evidence bearing on the punitive damage award and that also requires the appellate court to explicate the substance of its constitutional analysis in a published opinion. This heightened level of review serves as a constitutional check and balance to ensure that the trial court has fully addressed a litigant's constitutional challenge to the punitive damage award. The second component of issuing a detailed written opinion is the means by which the goals of deterrence can be achieved.

II. THE DE NOVO STANDARD OF REVIEW SHOULD BY ADOPTED BY THIS COURT BECAUSE IT PROTECTS LITIGANTS' DUE PROCESS RIGHTS.

Cases involving constitutional rights warrant a de novo standard of review. The de novo standard of review has been applied by this Court in other cases where fundamental constitutional rights were threatened. The de novo standard of review should also be applied here because "punitive damages pose an acute danger of arbitrary deprivation of property." *See e.g. Honda v. Oberg*, 512 U.S. 415, 432 (1994). Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of the defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local preferences. *Honda v. Oberg*, 512 U.S. 415, 432 (1994). Judicial review of the amount awarded is the safeguard that protects litigants from that danger. Accordingly, *Amici* urge this court to adopt the de novo standard of review here.

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court applied a de novo standard of review where a litigant's First Amendment rights were at issue. There, the Court explained that an independent examination of the whole record was necessary to ensure that a judgment did not constitute a forbidden intrusion into the realm of free expression. *Bose Corp.*, 466 U.S. at 508. The Court further noted that it has an obligation to test challenged judgments against the guarantees of the

First and Fourteenth Amendments, and in doing so cannot avoid making an independent constitutional judgment on the facts of the case. *Bose Corp.*, 466 U.S. at 508, n.27. Similarly, in *United States v. Bajakajian*, 524 U.S. 321 (1998), this Court applied a de novo standard review where an individual raised an Eighth Amendment challenge under the Excessive Fines Clause. Also, in *Ornelas v. United States*, 517 U.S. 690 (1996), this Court held that the issue of whether reasonable suspicions and probable cause to make a warrantless search violated the Fourth Amendment should be reviewed de novo. Finally, in *Miller v. Fenton*, 474 U.S. 104 (1985), the Court noted that without exception, where the ultimate issue of a case is the "voluntariness" of a criminal defendant's confession under the Fifth Amendment, an independent federal determination is required.

Amici note that in each of the foregoing cases, the defendant was threatened with the deprivation of his constitutional rights. In response, this Court was quick to apply the de novo standard of review to ensure that the defendant's fundamental rights were zealously protected. Here, *Amici* note that Petitioner's due process rights weren't just threatened – they were violated. As the nation's most respected institution, this Court should adopt the de novo standard of review as this will afford Petitioner with the full level of protections they are due under the United States Constitution.

In addition, *Amici* recognize that in many of the standard of review cases previously decided by this Court, the deprivation of property, liberty, or other fundamental right was typically occasioned by an act of an executive branch or the legislative branch. In the instant

case, however, the deprivation of property involved a component of the judiciary, namely, the entry of an order that affirmed a jury's imposition of a punitive damage award. *Amici* believe that no valid distinction exists for treating an error occasioned from the judicial branch any differently from when an abridgment of someone's constitutional rights takes place at the hands of an executive branch or the legislative branch. Should the standard of review be one of deference, we then risk the perception that the interests of the judiciary, as a branch of government, outweigh individual fundamental rights. This turns the Constitution on its head.

The Constitution and the Bill of Rights are supreme[3] and together they underscore the sanctity of individual rights. Personal freedoms and protections must triumph over governmental conduct when the activities of the government contravene fundamental rights and privileges. The question to which this Court granted certiorari wisely recognizes that the standard of review of punitive damage awards implicates a cherished and fundamental constitutional right. This Court has previously espoused that a de novo standard of review is necessary to ensure that fundamental constitutional rights are protected under the First, Fourth, Fifth, Eighth and Fourteenth Amendments. Because what is at issue in the instant case

[3] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI.

is the unconstitutional deprivation of property in violation of the Fifth Amendment due process protections, *Amici* respectfully urge this Court to apply the same de novo standard of review here. This heightened standard of review will safeguard Petitioner's constitutional rights, continue the judiciary's tradition of zealously protecting fundamental rights, and further the judiciary's cherished status as the most respected institution Americans possess.

Accordingly, *Amici* respectfully request that this Court rule in favor of Petitioner Cooper Industries, Inc.

CONCLUSION

Amici respectfully urge this Court to adopt the de novo standard of review here. This Court's answer to the question presented will have a major impact on two crucial concerns.

The adoption of the de novo standard of review will further the interests of outward deterrence identified by this Court in *Haslip*, and serves to better illuminate the constitutional boundaries beyond which punitive damage awards may not go. This standard of review and the concomitant written opinion that explicates the court's detailed reasoning on fundamental constitutional issues will aid the American public as it enters the new millennium.

More importantly, the selection of the de novo standard of review assures the American public that this

Court is continuing its tradition of zealously protecting the constitutional rights of defendants.

For the reasons heretofore stated, *Amici* respectfully request that this Court rule in favor of Petitioner, Cooper Industries, Inc.

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IN THE
Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What are the appropriate standard of review and legal analysis for a federal appellate court, on appeal of district court's denial of a new trial motion under Federal Rule of Civil Procedure 59, to employ in determining the constitutionality of a punitive damages award under the Due Process Clause.

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INTEREST OF *AMICUS*[1]

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

Jury verdicts awarding excessive punitive damages are a matter of serious and growing concern to railroads. Railroads have a presence in 49 states, where 555 freight railroads operate over 170,000 miles of track. Association of Am. R.Rs., *Railroad Facts* 3 (2000). Despite enormous progress in railroad safety, accidents still occur, and by their nature often involve fatalities and severe injuries. Federal R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 1999*, at 1-7 (2000) (Table 1-1), *available at* http://safetydata.fra.dot.gov/objects/bull99.pdf. In 1999, railroad accidents and incidents involving the general public resulted in 949 lawsuits being filed against railroads. Association of Am. R.Rs., *1999 Claim & Litigation Report* 3-7 & 3-8 (Aug. 2000). Given that trials involving fatalities or serious injuries are often emotionally charged, railroads, like other interstate businesses, have been subject to large but unjustified punitive damage awards. See, *e.g.*, *CSX Transp., Inc.* v. *Palank*, 743 So. 2d 556, 564 (Fl. Dist. Ct. App. 1999) ($50 million in punitive damages awarded to decedent's estate in action arising out of train derailment), *cert. denied*,

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[1] This brief is submitted with the consent of counsel for all parties. No person or entity, other than *amicus* and its members, made any monetary contribution to the preparation of this brief, and no counsel for any party authored this brief in whole or part.

121 S. Ct. 65 (2000); *Alcorn* v. *Union Pac. R.R.*, No. CV97-31927 (Jackson County Mo. Cir. Ct. Sept. 27, 1999) ($50 million in punitive damages). For that reason, AAR and its member railroads have an abiding interest in assuring that jury awards of punitive damages are subjected to proper and adequate review by the courts.

Moreover, the experience of the railroad industry underscores the need for this Court, in determining the proper appellate standard of review, to consider the many kinds of errors affecting punitive damages that are raised in new-trial motions and that an appellate court may be called upon to review. In federal as well as state court, large punitive damages awards are often the result of improper attorney argument or evidentiary rulings that give the jury a distorted picture of the dangerousness of a situation allegedly created by the railroad and the claimed reprehensibility of its conduct. The narrow question of whether appellate courts review determinations of the constitutionality of punitive damages awards *de novo* or for abuse of discretion cannot be answered without broader consideration of the role of the appellate courts in review of district court new-trial rulings under Federal Rule of Civil Procedure 59.

The AAR has a special interest in filing a brief in this case because its view of the proper appellate standard of review is not fully reflected in the positions taken by either of the parties, at least at the certiorari stage. The federal appellate courts have an obligation to conduct a *de novo* legal analysis under *BMW of North America* v. *Gore*, 517 U.S. 559 (1996), of whether the punitive damages award is so "grossly excessive" as to violate the Due Process Clause. Under Federal Rule of Civil Procedure 59, however, a district court may set aside a punitive damages verdict as a matter of discretion, even if the award is not unconstitutional under *BMW*. For example, it may do so if, after reweighing the evidence it finds the verdict to be excessive, or because it determines that certain evidentiary or procedural rulings may have tainted the

punitive damages verdict. Because a denial of a Rule 59 motion does not involve strictly legal questions, but discretionary ones as well, the overall appellate standard of review should be abuse of discretion. All legal questions (including the constitutionality of the verdict) are subsumed within this overall standard. As the Court has repeatedly held, this does not mean that a legal question is treated as a matter of the district court's discretion, or that appellate review of issues of law is any less stringent. The appellate court must make an independent determination of all legal questions, and any error of law by the district court (such as failing to set aside an unconstitutional damages award) is *per se* an abuse of discretion.

STATEMENT

After a jury awarded $4.5 million in punitive damages to respondent Leatherman Tool Group, Inc. ("Leatherman"), petitioner Cooper Industries, Inc. ("Cooper") filed a post-trial motion under Federal Rule of Civil Procedure 59. It argued, *inter alia*, that the award, which was 90 times the amount of compensatory damages, violated the Due Process Clause as interpreted in *BMW of North America v. Gore*, 517 U.S. 559 (1996). The district court denied Cooper's motion, and found that the award of punitive damages was "fairly proportional" given the nature of the conduct, the evidence of intent, and the need to deter a defendant of Cooper's size and assets. Pet. App. 24a. On appeal, the Ninth Circuit affirmed the judgment in relevant part. On the constitutional issue, the court of appeals held that the district court's determination that "the punitive damage award was proportional and fair" was "supported by the evidence," and thus did not violate Cooper's due process rights. *Id.* at 3a. Therefore, the court of appeals held that the "district court did not abuse its discretion in declining to reduce the amount of punitive damages." *Id.* at 4a.

SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 59, the district court, sitting as a "thirteenth juror" and independently evaluating the evidence presented to the jury, has broad discretion to grant a new trial (or to condition denial of a new trial on remittitur) if it deems a punitive damages award to be excessive. In exercising its Rule 59 discretion, the district court applies state-law standards relating to excessiveness (where state law provides the basis for the damages award, as is typically the case). The district court's discretion to deny a new trial motion and uphold a jury verdict is circumscribed by the constitutional prohibition against "grossly excessive" awards of punitive damages, as violative of the Due Process Clause. *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996). Under Rule 59, the district court also has broad discretion to grant a new trial if erroneous evidentiary or procedural rulings or jury instructions prejudiced the defendant and affected the amount of damages awarded.

In determining on appeal whether a verdict upheld by a district court violates the Due Process Clause because the damages are "grossly excessive," an appellate court resolves that legal question *de novo* by performing the analysis of federal constitutional standards set forth in *BMW*. Indeed, this Court has held in analogous circumstances, involving the excessiveness of fines under the Eighth Amendment and the reasonableness of searches and seizures under the Fourth Amendment, that an appellate court reviews *de novo* the application of a constitutional standard to the facts of a case.

The legal nature of the appellate court's determination of the constitutionality of the verdict is not determinative of the appellate standard of review for Rule 59 orders. As a formal matter, the proper standard of review is "abuse of discretion." The reason is that the district court, above and beyond its constitutional duty to set aside grossly excessive verdicts, has substantial discretion to grant a new trial to prevent the

injustice of a damages award that it deems excessive, or that is tainted with evidentiary, procedural, or instructional error. When a federal appellate court is reviewing an order that implicates the discretion of the district court, this Court has held that abuse of discretion is the proper standard, even if the appellate court will decide issues of law in the course of that review. An abuse-of-discretion standard does not mean, however, that the court of appeals yields to the constitutional analysis of the district court. When presented with a claim that a punitive damages award violates the Due Process Clause, the appellate court conducts the same independent, substantive legal analysis of the constitutional issue that it would if a *de novo* standard were applicable. But there is no reason to create multipart standards, where some questions are reviewed *de novo* and others for abuse of discretion. This needlessly complicates the appellate court's task. Accordingly, in like circumstances, this Court has favored a unified abuse-of-discretion standard under which an error of law (here, the failure to set aside an unconstitutional verdict) is *per se* an abuse of discretion.

An abuse-of-discretion standard makes particular sense for Rule 59 determinations. First, in the context of review of excessive compensatory damages awards, this Court has adopted that standard even though it recognized that such review may involve questions of state law. Second, in many instances a district court will set aside a punitive damages award without invoking the Due Process Clause, and a single standard should apply to all Rule 59 determinations regarding excessive damages. Third, even where a damages award is grossly excessive in violation of the Due Process Clause, the district court would generally have discretion to decide if the relief should be a new trial or a remittitur. It simply would not have discretion to leave the award in place. Fourth, the abuse-of-discretion standard underscores that there are multiple grounds for an appellate court to overturn the denial of a Rule 59 motion apart from the constitutionality of the verdict.

This Court should reject the proposal by certain law professor *amici* that the standard of review should be an adaptation of the "rational factfinder" test of *Jackson* v. *Virginia*, 443 U.S. 307 (1979), whereby a punitive damages verdict would be upheld if, construing the evidence in favor of the verdict, a rational juror could award such damages. First, the "rational factfinder" test is a measure of the sufficiency of the evidence to determine whether a judgment of acquittal should be entered for a criminal defendant. It has nothing to do with new-trial motions, where the district court (in both criminal and civil cases) independently evaluates the evidence and the credibility of witnesses to determine if the verdict is unjust. Second, the "rational factfinder" test is inapposite because punitive damages awards are not findings of historical or predictive fact like determinations of criminal guilt, but are discretionary determinations by the jury of optimal retribution and deterrence. Third, that test is flatly inconsistent with *BMW*. In *BMW*, this Court did not simply re-examine record evidence to determine if it could support the jury's verdict, but it undertook an independent legal analysis of 1) the degree of reprehensibility of conduct as measured against standards set forth in legislation and judicial cases, 517 U.S. at 575-80; 2) the ratio of punitive damages to compensatory damages, *id.* at 580-83; and 3) the treatment of comparable conduct in statutes and judicial decisions, *id.* at 583-85.

In this case, the court of appeals invoked the abuse-of-discretion standard, but it did not conduct the required independent analysis of the federal *BMW* guideposts to determine whether the verdict violated the Due Process Clause. The judgment below should be vacated and remanded.

ARGUMENT

I. FEDERAL APPELLATE COURTS INDEPENDENTLY DETERMINE THE CONSTITUTIONALITY OF A PUNITIVE DAMAGES AWARD IN REVIEWING DISTRICT COURT NEW-TRIAL RULINGS FOR ABUSE OF DISCRETION.

Juries, federal district courts, and appellate courts all have distinct roles and responsibilities in cases where a civil plaintiff seeks punitive damages in addition to compensation for harm suffered. While it is the role of the jury to determine whether to impose punitive damages and in what amount, district courts exercise an historic discretion, authorized by Federal Rule of Civil Procedure 59, to set aside verdicts in order to prevent injustice. State law, under which claims for punitive damages commonly arise, establishes criteria that guide not only the jury's imposition of punitive damages but also the district court's determination of when damages are excessive. *Gasperini* v. *Center For Humanities, Inc.*, 518 U.S. 415, 430-31 (1996). Additionally, this Court's recent decisions have made clear that the Due Process Clause sets outer limits on the extent of such punishment. *BMW of N. Am.* v. *Gore*, 517 U.S. 559 (1996). Appellate review of punitive damages awards is an essential "control" necessary to ensure that the punishment of defendants, even if warranted, is not unjust or contrary to law. *Gasperini*, 518 U.S. at 435.

This Court has held that the proper standard of appellate review of district court rulings on new trial motions to set aside excessive damages verdicts is abuse of discretion, *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989); *Gasperini*, 518 U.S. at 431 n.12, 434-35, but nothing in that standard compromises the power and duty of an appellate court to conduct independent analysis of whether the verdict violates the Due Process Clause. As this Court has stated, even under an abuse-of-discretion standard,

"[t]he deference that is due depends on the nature of the question presented." *Koon* v. *United States*, 518 U.S. 81, 98 (1996). More critical than the label attached to the standard of review is that this Court clarify the respective roles of federal district and appellate courts: namely, the broad discretion of the district court, applying state law standards, to prevent injustice by setting aside damages awards that are excessive or infected by procedural error; the duty of the appellate court to ensure that the district court did not abuse its discretion in so doing; and the independent duty of the appellate court to apply (without any deference to the district court) the federal constitutional standards established in *BMW* to determine whether the verdict is so grossly excessive as to deny due process.

A. District Courts Have Discretion Under Federal Rule Of Civil Procedure 59 To Set Aside Excessive Damages Awards Even If Those Awards Do Not Violate The Due Process Clause.

In federal court, district courts review challenges to the excessiveness of punitive damages awards by the authority granted by Federal Rule of Civil Procedure 59. See *Gasperini*, 518 U.S. at 438 n.22 ("It is indeed 'Hornbook' law that a most usual ground for a Rule 59 motion is that 'the damages are excessive'") (citing C. Wright, *Law of Federal Courts* 676-77 (5th ed.1994)); *Browning-Ferris*, 492 U.S. at 279. Rule 59 prescribes that "[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59. ,Accordingly, under Rule 59, a district court has discretion to grant a new trial on the grounds "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving," and it may rule on "questions of law arising out of alleged substantial errors in admission or

rejection of evidence or instructions to the jury." *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940). If it finds that the damages award was excessive, the district court may grant a new trial outright, or it may deny the motion upon the condition that the plaintiff remit the excessive portion of the damages, a practice known as remittitur. *Dimick* v. *Schiedt*, 293 U.S. 474, 484-85 (1935).

The authority of district courts to grant new trials for excessive damages under Rule 59 is "large." *Gasperini*, 518 U.S. at 433. In performing its obligations under Rule 59, the district court judge sits as a "thirteenth juror," in the limited sense that it must evaluate and weigh the evidence independently. See *Applebaum* v. *United States*, 274 F. 43, 46 (7th Cir. 1921) ("In order properly to exercise [the discretion to set aside a verdict,] it is manifest that the trial judge, as well as the jurors, should attentively consider and weigh the evidence as it is being introduced, because in that respect he is sitting as the thirteenth juror"); see also *Southern Ry.-Carolina Div.* v. *Bennett*, 233 U.S. 80, 87 (1914) ("a case of mere excess upon the evidence is a matter to be dealt with by the trial court"); *Complete Auto Transit, Inc.* v. *Floyd*, 249 F.2d 396, 399 (5th Cir. 1957) (unlike appellate courts, district courts have discretion to set aside verdicts that are excessive "as a matter of fact"); cf. *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982) (describing a court as sitting as a "thirteenth juror" when it considers, and potentially disagrees with, "the jury's resolution of the conflicting testimony"). A district court is not free to set aside a jury's verdict simply because it would have awarded a different amount, but "'[i]f it should clearly appear that the jury . . . have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.'" *Gasperini*, 518 U.S. at 433 (quoting *Blunt* v. *Little*, 3 F. Cas. 760, 761-62 (No. 1,578) (C.C. Mass. 1822) (Story, J.)). Because the district court has the unique prerogative and duty to weigh the evidence independently, without obligation

to construe the evidence in favor of the verdict, in the federal system (as at common law[2]) the grant of a new trial for excessive damages, or a remittitur, is confided to the sound discretion of the district court. *Gasperini*, 518 U.S. at 435 ("'We must give the benefit of every doubt to the judgment of the trial judge.'") (quoting *Dagnello* v. *Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961)); *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) ("The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court."); *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 540 (1958).

In conducting its discretionary review of punitive damages awards for excessiveness, the district court draws on its special institutional competencies vis-à-vis the jury to prevent injustice. Unlike compensatory damages, which involve assessment of historical or predictive facts, "the level of punitive damages is not really a 'fact' 'tried' by the jury." *Gasperini*, 518 U.S. at 469 (Scalia, J., dissenting). As the Fourth Circuit recognized, "[t]he jury's determination of the amount of punitive damages . . . is not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct." *Atlas Food Sys. & Servs., Inc.* v. *Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996); cf. *Lockhart* v. *McCree*, 476 U.S. 162, 183 (1992) (noting, in the context of capital sentencing, that a jury exercises far greater discretion in imposing punishment

[2] *See Bright* v. *Eynon*, 97 Eng. Rep. 365, 368 (K.B. 1757) (Denison, J.) ("[I]t would be difficult perhaps to fix an absolutely general rule about granting new trials; without making so many exceptions to it, as might rather tend to darken the matter, than to explain it: but the granting a new trial, or refusing it, must depend upon the legal discretion of the Court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."); *see also Gasperini*, 518 U.S. at 445 n.5 (Steven, J., dissenting).

than in "the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant"). These are not judgments that juries are institutionally more competent or legitimate to make than are judges.

Without displacing the primacy of the jury in awarding punitive damages, a district court conducting Rule 59 review provides an essential and principled check on arbitrary punishment, making "certain that [the awards] are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21 (1991). Whereas a jury is a one-time participant in the legal system with no experience beyond the single case before it, "the district courts not only see punitive damages awards daily, but themselves are required frequently to impose penalties for punishment and deterrence in a wide array of circumstances, both in civil and in criminal contexts." *Atlas*, 99 F.3d at 594; see, *e.g.*, *Tull* v. *United States*, 481 U.S. 412, 426-27 (1987) (noting that "highly discretionary" statutory civil-penalty calculations are more traditionally the province of judge rather than jury). Although a district court may set aside a punitive damages award because it is unwarranted by the evidence, a ruling that damages are excessive also may turn on determinations requiring judicial expertise, such as comparing the treatment of similar conduct in other cases or in legislation imposing sanctions. See *BMW*, 517 U.S. at 583 (citing *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part)). The substantial discretion afforded trial judges under Rule 59 to prevent the injustice of excessive punitive damages awards reflects their unique position of having both firsthand exposure to the evidence in a particular case and the institutional capacity to ensure that punishment is not meted out arbitrarily across cases.

Despite the broad leeway accorded to the district courts, state and federal law prescribe standards for (and limits upon)

a district court's exercise of Rule 59 discretion. See *Browning-Ferris*, 492 U.S. at 279 ("[I]n reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered."). As this Court has noted, in diversity cases, "state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy." *Gasperini*, 518 U.S. at 431 n.12.

The federal constitutional limit stems from the Due Process Clause, which this Court has interpreted to prohibit a State from imposing a punitive damages award that is "grossly excessive." *BMW*, 517 U.S. at 575; *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 454 (1993). In *BMW*, this Court identified three "guideposts" to determine when an award meets this constitutional threshold: "the degree of reprehensibility of the [underlying conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 575. Because these are federal constitutional standards, this Court conducted independent *de novo* analysis of whether the verdict was so grossly excessive as to violate the Due Process Clause, without regard to any discretionary determinations of the state courts in applying state standards of excessiveness.

The Court never intimated, however, that these guideposts were unique to a due process inquiry; to the contrary, it suggested that they were traditional indicia of the reasonableness of an award. See *id.* at 575 & n.23 (citing degree of reprehensibility as "the most important indicium of the reasonableness of a punitive damages award" because "'[t]he flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive

damages'") (quoting Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 Vill. L. Rev. 363, 387 (1994)); *id.* at 580 (stating the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff," and noting the "long pedigree" of the ratio or proportionality principle in the case law). Indeed, under Rule 59, courts have long considered such factors in determining whether punitive and compensatory awards are excessive, often because state laws have explicitly incorporated these, or similar, factors into their own definition of "excessiveness."[3]

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[3] *See, e.g.*, *Shaw* v. *Titan Corp.*, No. 96-2143, 1998 WL 277045, at *4 (4th Cir. May 18, 1998) (unpublished) (considering, in accord with Virginia law, such factors as the ratio of the punitive damages award to harm suffered and the "measurement of punishment required"); *Cline* v. *Wal-Mart Stores, Inc.*, 144 F.3d 294, 306-07 (4th Cir. 1998) (finding that the punitive damages award resulted in a "miscarriage of justice," after considering "the harm suffered by [plaintiff]; the degree of [defendant's] indifference towards [plaintiff's] rights . . . ; and the policy judgments inherent in any award of punitive damages"); *Mathie* v. *Fries*, 121 F.3d 808, 813 (2d Cir. 1997) (in reviewing a compensatory damages award, stating that "the determination of whether a damages award exceeds a reasonable range 'should not be made in a vacuum,' but should include consideration of the amounts awarded in other, comparable cases") (citation omitted); *Jenkins* v. *Raymark Indus. Inc.*, 782 F.2d 468, 474 (5th Cir. 1986) (under Texas law, when determining whether an award is excessive a court must consider such factors as "the nature of the wrong," "the character of the conduct involved," and "the degree of culpability of the wrongdoer"); *Joan W.* v. *City of Chicago*, 771 F.2d 1020, 1025 (7th Cir. 1985) (finding a compensatory damages award to be "fragrantly extravagant" in light of "the totality of the evidence and comparing this case to the other similar cases"); *Transgo, Inc.* v. *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (9th Cir. 1985) (noting that California law "requires that punitive damages bear a reasonable relationship to compensatory damages"); *T.D.S. Inc.* v. *Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1530 (11th Cir. 1985) (under Florida law, punitive damages must not be "out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct").

Because it may consider factors akin to the *BMW* guideposts as part of its Rule 59 excessiveness inquiry, a district court will generally not invoke the Due Process Clause to set aside a verdict that it would let stand as a matter of its discretion. Cf. *Grunewald* v. *United States*, 353 U.S. 391, 421 (1957) (avoiding Fifth Amendment question by ruling that district court as a matter of discretion should have refused to allow impermissible cross-examination). In other words, if the district court does not find a verdict to be "excessive" under Rule 59 after considering such factors, *a fortiori* the district court will not declare the award "grossly excessive" and thus unconstitutional under *BMW*. *BMW* is directly relevant to the district court only as a limit upon its discretion to *uphold* a punitive damages award. In those circumstances, *BMW* obliges a district court (in addition to applying state law standards) to analyze the constitutional guideposts and to make the legal determination of whether the award is so "grossly excessive" as to violate the Due Process Clause. *BMW*, 517 U.S. at 525; *Gasperini*, 518 U.S. at 431 n.12.

In summary, the decision to grant or deny a new trial, or deny it subject to remittitur, is an inherently discretionary determination of the district court, subject to the standards and limits imposed by state law and the Due Process Clause.[4]

[4] Although the Rule 59 excessiveness standard is governed in part by state law, where state law provides the basis for liability, there are limits on the extent to which state law can reduce a federal court's discretion to review the size of jury verdicts under Rule 59. Attempts to constrain the historic judicial discretion to review jury verdicts raise procedural due process concerns. *See Honda Motor* v. *Oberg*, 512 U.S. 415, 434 (1994) (finding that Oregon statute that prohibited judicial review "unless the court can affirmatively say there is no evidence to support the verdict" violated Due Process); *see also Pacific Mut. Life Ins.*, 499 U.S. at 18 ("One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). Nothing in the current Oregon review statute, *see* Or. Rev. Stat. § 18.537(2), prohibits a court's discretionary consideration of the *BMW* factors in determining the excessiveness of the verdict.

B. Because Rule 59 Motions Implicate The Substantial Discretion Of District Courts, The Proper Appellate Standard Of Review Is Abuse Of Discretion.

Because the district court has discretion to set aside excessive verdicts under Rule 59, above and beyond any legal duty to declare "grossly excessive" verdicts unconstitutional under *BMW*, the proper appellate standard of review is abuse of discretion, as this Court has ruled. See *Browning-Ferris*, 492 U.S. 257, 279 ("The court of appeals should . . . review the district court's [Rule 59] determination under an abuse-of-discretion standard"); see also *Neese* v. *Southern Ry.*, 350 U.S. 77, 77 (1955) (finding no abuse of discretion in decision to uphold a punitive damages verdict). The Court reiterated this standard in *Gasperini*, 518 U.S. at 434-35, even as it recognized that both state law and the Due Process Clause channeled and limited the district court's Rule 59 discretion to evaluate the excessiveness of a punitive damages award, *id.* at 431 n.12. But invocation of that standard is only the first step in the reviewing court's analytical process. The key inquiry becomes how that phrase gets applied to the myriad points of dispute about the propriety of a particular jury's verdict.

1. Abuse Of Discretion Is The Proper Standard Even Though Rule 59 Decisions May Involve Questions Of Law, Such As The Constitutionality Of The Verdict.

As this Court recognized in *Gasperini*, the presence of legal questions in a Rule 59 determination does not alter the standard of review. There should be no doubt that, considered independently, the question of whether a verdict is so "grossly excessive" as to violate the Due Process Clause is a legal question that an appellate court resolves *de novo* (*i.e.*,

without deference to the district court's determination of the verdict's constitutionality). As this Court has held in similar contexts, when the question under review "calls for the application of a constitutional standard to the facts of a particular case . . . *de novo* review of that question is appropriate." *United States* v. *Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (excessiveness of fines under the Eighth Amendment); *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (determining *de novo* the reasonableness of a search or seizure under the Fourth Amendment); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964) (determining *de novo* the existence of actual malice to defame under the First Amendment).

Nonetheless, a Rule 59 determination does not involve strictly or even primarily issues of the constitutionality of the verdict, and this Court has favored a single, unitary appellate standard of review that applies to the entirety of the district court's order. In particular, when an issue implicates the substantial discretion of the district court, even though questions of law may arise, this Court has held repeatedly that the abuse-of-discretion standard is proper. In *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401 (1990), this Court rejected the argument that when reviewing Rule 11 sanctions orders, it should adopt a tripartite standard based on whether the question at issue was one of law, fact or a mixed question of law and fact. It noted the difficulty generally of distinguishing between legal and factual issues, and in particular in making such distinctions in the Rule 11 context, because "[r]ather than mandating an inquiry into purely legal questions, such as whether the attorney's legal argument was correct, the Rule requires a court to consider issues rooted in factual determinations." *Id.* Similarly, in *Koon* v. *United States*, 518 U.S. 81 (1996), this Court held that an abuse-of-discretion standard was appropriate in review of federal sentencing decisions because the district court retained substantial sentencing discretion under the United States

Sentencing Guidelines, even though it recognized that district courts would "confront questions of law in deciding whether to depart" from the Guidelines. *Id.* at 98-100.

2. Appellate Courts Must Make An Independent Legal Determination Of The Constitutionality Of The Verdict Regardless Of Whether The Standard Is Abuse Of Discretion Or *De Novo*.

What is absolutely critical for proper analysis of the appellate role under Rule 59, however, is that the abuse-of-discretion standard does not require the court of appeals (or this Court) to yield to the district court's erroneous determinations of issues of law, including the constitutionality of the verdict. When a question of law arises, "the court of appeals need not defer to the district court's resolution of the point." *Id.* at 100. Accordingly, this Court has emphasized that "[l]ittle turns . . . on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Id.* But the fact that a decision "may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion." *Id.* "A district court by definition abuses its discretion when it makes an error of law." *Id.*

Although neither *Koon* nor *Cooter & Gell* involved issues of constitutional magnitude, an abuse-of-discretion standard can also accommodate independent appellate review of constitutional questions. See *Withrow* v. *Larkin*, 421 U.S. 35, 46, 55 (1975) (holding that a district court abused its discretion in issuing a preliminary injunction because of an erroneous due process analysis); *Morris* v. *Slappy*, 461 U.S. 1, 11-12, 14 (1983) (rejecting lower court's Sixth Amendment analysis in holding that denial of a continuance was not an abuse of discretion). The adoption of an abuse-of-discretion standard does not alter the nature of appellate review of the

constitutionality of the verdict. This is not and should not be a tyranny of labels. The Due Process Clause, which applies equally to state and federal courts, requires that appellate courts perform the same rigorous and independent evaluation of whether a verdict is "grossly excessive" that this Court did in conducting *de novo* review of the verdict in *BMW*.

3. An Abuse-Of-Discretion Standard Recognizes That There Are Multiple Bases For An Appellate Court To Set Aside A Punitive Damages Award Even If It Does Not Transgress Constitutional Limits.

Although there would be little substantive difference between adopting a separate *de novo* standard of review for the constitutionality of an award, and an abuse-of-discretion standard in which the appellate court independently resolves the constitutional question of gross excessiveness by analyzing the *BMW* guideposts without deference to the district court, considerations peculiar to Rule 59 counsel in favor of the latter.

First, as noted above, a district court, sitting as a "thirteenth juror," has broad discretion under Rule 59 to set aside a punitive damages award as "excessive" even if, under the Due Process Clause, the award is not "grossly excessive" as a matter of law. In making its determination of excessiveness, the district court may in its discretion examine many of the factors—degree of reprehensibility of conduct, ratio to compensatory damages awarded, and legislative and judicial treatment of comparable conduct—that are also pertinent in the *BMW* inquiry. See *supra* at 12-14. The abuse-of-discretion standard recognizes that the district court, independently weighing the evidence and applying state standards to the facts of the case, is in a preferred position vis-à-vis the court of appeals, which has access only to "'a cold paper record'" *Gasperini*, 518 U.S. at 421, *Cooter & Gell*, 496 U.S. at 401 ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the

pertinent facts and apply the fact-dependent legal standard . . . .") The abuse of discretion standard also reinforces the profound obligation of the trial court to fulfill its role as the "thirteenth juror." A decision to remit or set aside a verdict that may have been tainted by any of dozens of possible twists at a trial is vital to ensure that civil justice system operates fairly. Thus, the abuse of discretion standard signals to the trial courts that they must take this responsibility seriously and exercise sound judgment in deciding when and how to protect defendants against unjust punitive awards.

Second, the district court will not generally reach the due process question if it sets aside the award as a matter of its Rule 59 discretion. In reviewing such a Rule 59 order,[5] the court of appeals would simply review the district court's order for abuse of discretion (resolving pure questions of state law on its own, *Salve Regina College* v. *Russell*, 499 U.S. 225, 231 (1991)), and would not engage in independent review of the verdict under *BMW* because no due process question would be presented.[6] Rather than have separate standards for denials and grants of Rule 59 motions, it simply makes sense for this Court to adopt a single, overarching abuse-of-discretion standard, but one that recognizes that all issues of law presented, constitutional or otherwise, must be

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[5] If the district court orders a new trial under Rule 59 because the damages are excessive, ordinarily an appeal is taken after the conclusion of the new trial. *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34, 36 (1980) ("An order granting a new trial is interlocutory in nature and therefore not immediately appealable."); *see also Tri County Indus., Inc. v. District of Columbia*, 200 F.3d 836 (D.C. Cir.) (appeal taken after the second trial), *amended by*, 208 F.3d 1066 (D.C. Cir.), *cert. granted*, 121 S. Ct. 29 (2000).

[6] The exception is that, if a district court in its discretion orders only remittitur and judgment is entered for the remitted amount, the defendant may on appeal challenge the remitted amount as "grossly excessive" under *BMW*. Indeed, *BMW* itself involved a challenge to a remitted award. 517 U.S. at 581.

resolved independently by the appellate courts. See *Koon*, 518 U.S. at 100 (an error of law is by definition an abuse of discretion).

Third, even in cases where a constitutional violation is found, it would still generally be a matter of the district court's discretion to determine whether the proper remedy under Rule 59 is a new trial or remittitur. See *Gasperini*, 518 U.S. at 433; *Dimick*, 293 U.S. at 484-85; cf. *BMW*, 517 U.S. at 586 (remanding case to the state court to determine whether a new trial or a remittitur was appropriate to cure the constitutional violation). An abuse-of-discretion standard reflects the district court's leeway in formulating Rule 59 relief, even if the basis for relief is legal error.

Fourth, and significantly, a federal appellate court reviewing the size of a punitive damages award is not limited to the *BMW* analysis of the constitutionality of the verdict under the Due Process Clause. Quite apart from any constitutional challenge, defendants have long been able to appeal the district court's discretionary denial of a Rule 59 motion to set aside a damages award as excessive, and the courts of appeals have reviewed those denials for abuse of discretion. *Gasperini*, 518 U.S. at 434-35. This Court has characterized such review "as a control necessary and proper to the fair administration of justice." *Id.* at 435. For every case, "'surely there must be an upper limit'" to the amount of damages a jury may award, and whether the verdict exceeds that limit is an issue of federal law for the appellate court to decide. *Id.* (quoting *Dagnello*, 289 F.2d at 806); see also *id.* at 436; *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam).

In conducting this inquiry, a court of appeals determines whether the district court properly exercised its discretion under the excessiveness standards established by state law in letting a verdict of that size stand. Such appellate review is vital to the vindication of governing state law and the principles of *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938).

As this Court held in *Gasperini*, "[i]n light of *Erie*'s doctrine, the federal appeals court must be guided by the damage-control standard state law supplies," even as it gives deference to the discretion afforded the district court under Rule 59. 518 U.S. at 438. Thus, a court of appeals must reverse a denial of a new trial as an abuse of discretion if a district court simply rubberstamped the jury's verdict, and failed to engage in reasoned consideration of state law standards. Cf. *United States* v. *U.S. Currency, In The Amount Of $103,387.21*, 863 F.2d 555, 561 (7th Cir. 1988) ("An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered or when the court 'fails to analyze the applicable factors.'"). Moreover, even if the district court did address those factors, the court of appeals must reverse if as a matter of law the damages award is excessive under the state-law standards. *Gasperini*, 518 U.S. at 435.

Nonetheless, as this Court made clear in *BMW*, the fact that a verdict may not be excessive under state-law standards does not end the inquiry. 517 U.S. at 566-67 (setting aside damages award even though the Alabama Supreme Court had definitively ruled that the award satisfied state excessiveness standards). To ensure that the verdict comports with the Due Process Clause, the federal appellate court must also undertake an independent analysis of whether, as a matter of law, the verdict is grossly excessive under the *federal* constitutional standards identified in *BMW*.

Thus, a federal appellate court must make two separate legal analyses before it may uphold a punitive damages award: (1) it must determine whether the district court properly applied state-law standards in deciding whether damages are evasive, and (2) it must independently determine, based on the federal constitutional standards of *BMW*, whether the verdict violates the Due Process Clause. These are separate legal analyses, but they are in service of a single determination: namely, whether the verdict is grossly excessive as a

matter of law.[7] Because the appellate court is making a single determination, it simply makes sense for there to be a single, unitary standard of review. That standard should be abuse-of-discretion, which allows for appellate correction of errors of law without deference to the district court. *Koon*, 518 U.S. at 100. If the district court failed to grant a Rule 59 motion to set aside what a court of appeals determines to be an unconstitutional verdict, that is *per se* an abuse of discretion.

A final consideration in support of an abuse of discretion standard is that a defendant will often challenge a punitive damages award under Rule 59 on multiple grounds, and not solely on the size of the award. A defendant may challenge the jury instructions on damages, or the admission or exclusion of evidence bearing on reprehensibility of conduct or the actual or potential harm to plaintiffs, or prejudicial argument to the jury by opposing counsel. See *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940) (jury instructions and evidentiary rulings subject to challenge on Rule 59 motion).[8] The district court has broad discretion in admitting

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[7] Thus, it is not surprising that courts have used the term "grossly excessive" or its equivalent in identifying the kind of verdict which it would be an abuse of the district court's discretion to let stand. *See Grunenthal* v. *Long Island R.R.*, 393 U.S. 156, 159 n.4 (1968); *Peck* v. *Garfield*, 862 F.2d 1, 5 (1st Cir. 1988) ("[A] court will not be said to have abused its discretion in denying a motion for a new trial based on an excessive damage award unless the jury's verdict is grossly excessive or shocking to the conscience."); *Smith* v. *Rowe*, 761 F.2d 360, 368 (7th Cir. 1985) (stating that appellate court would reverse lower court if "the verdict was so 'gross' or 'monstrously excessive' that the trial court abused its discretion in permitting it to stand"); *Complete Auto Transit, Inc.* v. *Floyd*, 249 F.2d 396, 399 (5th Cir. 1957) ("[T]he appellate court will declare that the trial court has abused its discretion if the verdict is so gross or inordinate in amount as to be contrary to right reason . . . .").

[8] *See also Caruolo* v. *John Crane, Inc.*, 226 F.3d 46 (2d Cir. 2000) (reviewing defendant's motion for a new trial on the basis of wrongly admitted evidence, improper jury instructions, and improper summation); *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991)

or excluding evidence, formulating jury instructions, and controlling attorney misconduct. See *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141 (1997) (evidentiary rulings reviewed for abuse of discretion); *United States* v. *Stouffer*, 986 F.2d 916, 925 (5th Cir. 1993) (formulation of jury instructions reviewed for abuse of discretion); *United States* v. *Poole*, 207 F.3d 893, 899 (7th Cir. 2000) (district court's denial of a new trial motion alleging attorney misconduct during closing argument reviewed for abuse of discretion). However, if the defendant is prejudiced, see Fed. R. Civ. P. 61, a federal appellate court may nonetheless hold that the district court abused its discretion in not ordering a new trial because of evidentiary, instructional, or procedural error that may have affected the size of the punitive damage award, even if the award was not grossly excessive under *BMW*.[9] An

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(considering defendant's contention that the district court erred in admitting witness testimony and in instructing the jury); *Jordan* v. *Clayton Brokerage Co.*, 861 F.2d 172, 176 (8th Cir. 1981) (rejecting the argument that the district court improperly admitted prejudicial evidence and failed to instruct jury so as to mitigate the prejudice), *vacated on other grounds*, 499 U.S. 914 (1991); *Rodgers* v. *Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102, 1106 (6th Cir. 1984) (considering, as errors that affected the compensatory and punitive damage awards, inaccurate jury instructions and the plaintiff's improper closing argument to the jury). *Cf. Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (recognizing the gatekeeping role of the trial judge in admitting scientific evidence). A party may appeal evidentiary, instructional, and procedural rulings simply as trial error, but, as the cases above illustrate, it is common for those issues to be raised as a claim of error in denying a Rule 59 motion.

[9] This Court has repeatedly emphasized the courts must ensure that discretion is exercised according to legal principles. *See United States* v. *Taylor*, 487 U.S. 326, 335 (1988) ("Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise."); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) ("[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (CC Va. 1807) (No. 14,692d) (Marshall, C.J.)).

abuse-of-discretion standard recognizes the many bases, apart from constitutional defects, for setting aside a punitive damages award.

Although abuse-of-discretion is the proper formulation of the appellate standard for review of a district court's Rule 59 rulings, at the end of the day it is of little importance whether this Court formally declares that standard, or adopts a two-part standard under which the constitutional review of *BMW* is recognized to be *de novo*. See *Koon*, 518 U.S. at 100. What is important is that this Court clarify for the courts of appeals the substantive analysis that they must undertake in reviewing punitive-damages awards: namely, (1) whether the district court improperly applied state-law standards in determining that the damages were excessive, and (2) whether, by independent and *de novo* application of the federal constitutional standards set forth in *BMW*, the verdict violates due process.

Although the Ninth Circuit invoked the abuse-of-discretion standard, Pet. App. 4a, nothing in the record suggests that it conducted the searching, independent legal analysis of the *BMW* guideposts that is required under the Due Process Clause in federal as well as state court. To the contrary, its offhand statement that the district court's "findings were supported by the evidence, such that the award did not violate Cooper's due process rights," *id.* at 3a, indicates an inappropriate deference to the district court in determining whether a constitutional violation occurred. For that reason, even though the AAR's analysis may depart in some respects from the position of petitioner, it believes that the decision should be vacated and remanded for proceedings in compliance with the standards outlined above.

II. THE "RATIONAL FACTFINDER" TEST IS NOT THE PROPER STANDARD.

In their Brief in Support of Petitioner at the certiorari stage, *Amici Curiae* Erwin Chemerinsky and Arthur F. McEvoy

argue for what they call "*de novo* review of what is termed a 'legal' issue under a 'rational factfinder' standard." *Amici* Br. at 3. This standard fails to accord federal district courts sufficient discretion in their review of jury verdicts; mistakes sufficiency-of-the-evidence standards for new-trial standards; and in any case misapprehends the nature of the *BMW* analysis.

The law professor *amici* simply ignore that the federal district court, in disposing of a Rule 59 motion, is entitled to reweigh the evidence, drawing its own inferences and assessing witness credibility. See *supra* at 9-10. In discussing their preferred standard, the law professor *amici* baldly state that "there is no discretion actually accorded the district court" in regard to the evidence, *Amici* Br. at 4, and that "excessiveness is treated as a 'legal' question, decided on the record with all legitimate factual inferences drawn in favor of the jury's result." *Id.* There is simply no basis in the law for the contention that under Rule 59 the district court has no more discretion than an appellate court to reevaluate the evidence, or that the district court must accept the evidence as found by the jury. Indeed, if a district court in ruling on a Rule 59 motion were to hold that certain evidence relevant to a punitive damages award was incredible, or to hold that the award could not be justified on the evidence of record, a federal appellate court should review that determination for abuse of discretion, rather than simply construe the evidence in favor of the verdict.

The *amici*'s invocation of the "rational factfinder" standard of *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979), betrays their misunderstanding of Rule 59 motions. The *Jackson* standard is a sufficiency-of-the evidence standard for criminal trials under the Due Process Clause that determines when judgment of acquittal must be entered, and its civil analogue is not a Rule 59 motion for a new trial but a Rule 50 motion for judgment as a matter of law. See Fed. R. Civ. P. 50; *Brady* v. *Southern Ry.*, 320 U.S. 476, 479-80 (1943) (civil

judgment as a matter of law appropriate where there is but "one reasonable conclusion as to the verdict"). As this Court held in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940), these two motions serve different functions and are determined by wholly different standards. *Id.* at 251. To the extent any criminal analogue were even relevant, it would be the standard for new trials under Federal Rule of Criminal Procedure 33. That standard, it is well established, accords the district court discretion to grant a new trial based on its own evaluation of the evidence as "a thirteenth juror." 3 Wright & Miller, *Federal Practice & Procedure* § 553 (1982).

Finally, even if an appellate court confronting a specific evidentiary issue unaddressed by the district court were entitled to draw "reasonable inferences" in favor of the verdict, based on its review of the record as a whole, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000),[10] that is a far cry from establishing *Jackson*'s "rational factfinder" test as the legal standard by which to conduct the *BMW* analysis of the constitutionality of a jury verdict.

First, the "rational factfinder" standard is inapposite because an award of punitive damages is not at all a finding of fact analogous to a verdict of guilty in a criminal case. Unlike a guilty verdict, which rests on evidence that is a matter of historical fact, "the level of punitive damages is not really a 'fact' 'tried' by the jury." *Gasperini* v. *Center For Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting). The jury's award of punitive damages depends in part on historical fact, but also on its own policy judgments as to such factors as deterrence and retribution. As such, review of the award for mere rationality is insufficient. Gross excessiveness remains a legal determination for the court, and not

[10] The appellate court need not credit internally contradictory or impeached evidence, or evidence wholly inadequate to support a damages verdict.

simply a judicial check on the rationality of a jury's finding of fact.

Second, the rational-factfinder test is in conflict with *BMW* itself. Nothing in that decision suggests that an appellate court conducts a review solely of the evidence of record to determine whether it supports a jury's verdict. Rather, the three "guideposts" this Court identified in *BMW* are legal, judicial determinations to ascertain whether the verdict comports with "[e]lementary notions of fairness" and whether the defendant "receive[d] fair notice . . . of the severity of the penalty that a State may impose." *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 574 (1996). Thus, in determining the degree of reprehensibility of the defendant's conduct, this Court did not confine itself to evidence of record but examined case law and statutes relevant to the gravity of certain kinds of conduct, *id.* at 575-76. This is not simply review of the rationality of a jury finding. Similarly, the determination of the proportional relationship between a ratio of compensatory and punitive damages is a legal standard for gauging the reasonableness of the damages award in various circumstances, *id.* at 580-82, and not an examination of the record to find support for the jury's verdict. Finally, the comparison of the punitive damages award to legislative sanctions for comparable conduct is a legal inquiry that no jury undertakes. *Id.* at 583-84. The law professors' "rational factfinder" standard is simply fish out of water in *BMW* review of the constitutionality of a punitive damages award.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be vacated and remanded for proceedings in compliance with the standards outlined in this brief.

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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AMICUS CURIAE BRIEF OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of *amicus curiae* briefs have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury, vindication of civil rights protected under federal and state statutes, and in other actions seeking legal redress.

ATLA's mission includes the preservation of the right to trial by jury for all Americans as guaranteed by the Seventh Amendment. Petitioner in this case seeks an unprecedented expansion of federal appellate re-examination of jury verdicts. Because de novo review of punitive damage awards by the courts of appeals represents a radical infringement of this constitutional safeguard, ATLA respectfully submits this brief as *amicus curiae* in support of the Respondent.

SUMMARY OF THE ARGUMENT

1. Petitioner urges this Court to recognize a new substantive due process right to limit punitive damages to a predictable level of reasonableness. Traditional and historical practice, the touchstone of the Due Process Clause does not support such a novel right.

The traditional procedure for assessing punitive damages has historically been characterized by the broad discretion vested in the jury in determining the appropriate amount of punitive damages.

This Court has recognized that the jury's discretion is not unbounded. Common law courts have historically reserved the authority to set aside verdicts that are so excessively high in view of the record evidence that they amount to a

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a monetary contribution to the preparation or submission of this brief.

deprivation of property without due process. None of the precedents found in the common law in 1791 or of this Court support the notion that predictability of punitive damages or consistency among comparable cases is an essential element of fundamental fairness.

Nor is there any support for Petitioner's argument that the factors identified by this Court in the *BMW* case can only be applied by federal appellate courts. Indeed, there is no constitutional right to appellate review at all. Acknowledging that those factors -- the degree of reprehensibility of the misconduct, the ratio of punitive to compensatory damages, and other applicable civil and criminal penalties -- are relevant to a fair and reasonable assessment of punitive damages, they are appropriate for consideration by the jury. Indeed, appellate review of punitive damage awards using factors or evidence that was not presented to the jury violates the Seventh Amendment.

2. Substitution of the federal appellate court's estimation of an appropriate amount of punitive damages for the verdict of the jury clearly violates the Seventh Amendment.

Petitioner's argument that jury verdicts assessing punitive damages are not within the protection of the Seventh Amendment is erroneous. Indeed, the historical development of the jury's authority to assess punitive damages gave impetus to the adoption of the Seventh Amendment itself.

This Court has never held that punitive damages are not a "fact" found by the jury. Indeed, the Court has recently held that where the Seventh Amendment guarantees a jury trial on liability, it also guarantees a jury determination of the amount of damages.

3. De novo review of punitive damage awards other than for irrational excessiveness necessarily requires the federal appellate court to apply a standard of reasonableness that reflects its own values. Those values threaten to undermine or contravene the state interests in providing punitive damages.

Review for the purpose of making punitive damages predictable, for example, undermines the policy of many states which recognizes that it is the unpredictability of such damages which makes them an effective deterrent to wrongdoing. Any standard of reasonableness represents an policy judgment that is reserved to the states, not to the federal appellate judiciary.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT ENTITLE DEFENDANTS TO APPELLATE MODIFICATION OF JURY VERDICTS TO ASSURE THAT PUNITIVE DAMAGE AWARDS ARE PREDICTABLE AND CONSISTENT.

Petitioner and supporting amici urge this Court to establish a new substantive due process right: A constitutional right to predictability in the amount of punitive damages imposed under state law.

This Court has held that defendants have a substantive due process right to set aside punitive damage awards that are excessively high, under the circumstances of the case. The Court added, however, that due process does not guarantee that punitive damage awards be consistent or predictable in amount. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.") The Court reaffirmed this principle in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582-83 (1996) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993).

Petitioner nevertheless urges this Court to assign such a task to the courts of appeals. Through de novo review of punitive awards, Petitioner anticipates that federal appellate

courts will construct a bright line, tile by tile, like a mosaic. Pet. Brief at 18.[2]

To reach its objective, Petitioner recognizes that it must establish two radical propositions of constitutional law. First, that the Due Process Clause of the Fifth Amendment requires that the amount of punitive damages assessed in similar cases be reasonably consistent and predictable. *See* Pet. Brief at 10 & 11.

Secondly, Petitioner must establish that its proposed method for imposing this predictability in awards, de novo appellate re-examination of jury verdicts by federal appellate courts, is consistent with the Seventh Amendment. *Id.* at 28-29.

ATLA submits that Petitioner's argument fails on both counts. Predictability in the amounts of punitive damage awards is neither desirable nor required by the Due Process Clause. In addition, de novo review by appellate courts, substituting their judgment of the appropriate level of punitive damages for that of juries, violates the Seventh Amendment.

A. Substantive Due Process Does Not Entitle a Defendant to a Predictable Amount of Punitive Damages.

This Court has indicated that the standard of review of punitive damages for gross excessiveness is roughly equivalent to the "rational juror" standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), which would ask whether any rational trier of fact juror could have arrived at the jury's punitive damage award in light of the record evidence. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432

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[2] The Petition For Certiorari argued that de novo review was necessary to protect Cooper from a verdict that was grossly excessive under the circumstances of this case. See, Pet. for Cert. at 13-14. Cooper's Brief on the Merits makes the far different claim that such review is needed to foster "an environment of predictability and reasonableness." Pet. Brief at 27.

n.10 (1994). Petitioner explicitly rejects this standard as insufficient. Pet. Br. at 26 n.20. Instead, Petitioner urges this Court to recognize a new substantive due process right to limit punitive awards to predictable amounts.

In support, Cooper relies on an research study funded by Exxon Corp., using volunteers as mock jurors. The volunteers were given a variety of fact patterns and asked to determine whether the conduct warranted punitive damages, how they would rank the reprehensibility of the misconduct on a bounded scale, and how much they would assess as punitive damages. The researchers grouped the respondents into "virtual juries" and compared their "verdicts." Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998)

What they found was that the mock juries were highly consistent -- remarkably so, according to the researchers -- in determining liability for punitive damages and the degree of reprehensibility of the misconduct. However, the amounts representing the suggested punitive awards varied widely. *Id.* at 2074.[3]

ATLA submits that there is no basis for the notion that substantive due process guarantees that a defendant be able to predict the amount of punitive damages that might be assessed for misconduct.

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[3] Empirical studies of real-world jury verdicts suggest that punitive damage award are not arbitrary and that their unpredictability has been overstated. Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623 (1997).

One salutary result of this Court's attention to punitive damage awards has been to prompt extensive empirical research. Professor Michael Rustad offers a detailed overview of the results of these objective empirical studies, all of which suggest that punitive damages generally are rarely awarded and tend to be modest in amount. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15 (1998).

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994), citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L.Ed. 372 (1856)." Traditional practice with respect to punitive damages has historically been characterized by the broad discretion vested in the jury.

The authority of the jury to award damages in tort actions to punish and deter particularly egregious misconduct was first established in *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763), and *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763), in which the Lord Chief Justice Pratt underscored the reluctance of common law courts to interfere with the amount of the jury's award.

This Court's decisions have consistently emphasized the jury's role in fashioning individualized punitive damage awards, not uniformity of outcomes. *See, e.g., Day v. Woodworth*, 13 How. 363, 371, 14 L.Ed. 181 (1852) (assessment of "exemplary, punitive, or vindictive damages . . . has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case"); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("[t]he discretion of the jury in such cases is not controlled by any very definite rules"); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (in "actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict").

In *Haslip*, this Court declared that this traditional common law method for ascertaining the amount of punitive damages does not violate due process. *Haslip* at 17-18.

At the same time, Justice Blackmun wrote for the majority in *Haslip*, the jury's discretion is not unbounded. The verdict in a particular case may be so excessive as to

violate a defendant's due process rights. *Id.* at 18. To describe this constitutional limitation, the Court again looked to traditional practice. Lord Chief Justice Pratt himself stated:

> Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

Huckle, 2 Wils. at 207, 95 Eng. Rep. at 769.

In four other decisions prior to 1791, English courts asserted their authority to set aside a jury award that was so high as to indicate that the jury acted out of passion or prejudice or was irrational. *Beardmore v. Carrington,* 19 Howell's State Trials 1405, 1406 (C.P. 1764), 95 Eng. Rep. 790, 793-94 ("Can we say that 1000 pounds are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and pries into all his secret and private affairs . . . ?". . . We cannot say the damages of 1,000 pounds are enormous."); *Fabrigas v. Mostyn*, 2 Black.W. 929, 96 Eng. Rep. 549 (C.P. 1773) (Damages "may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury").

In *Sharpe v. Brice,* 2 Black. W. 942, 96 Eng. Rep. 557 (C. P. 1774), where a customs officer was held liable for trespass, motion for a new trial on grounds that the verdict was excessive was refused because of the circumstances in which the trespass had been committed. However, Chief Justice De Gray stated, "It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of tort." In *Leith v. Pope*, 2 Black. W. 1327, 1328, 96 Eng. Rep. 777, 778 (C. P. 1779), the jury's verdict for 10,000 pounds for malicious prosecution was upheld because of the outrageousness of the misconduct. The court added, "in cases

of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury."

These decisions make clear that common-law judges in 1791 reserved for themselves the authority to grant a new trial where the punitive damage award was "monstrous" or so flagrantly excessive in view of the evidence before the jury as to indicate some passion or prejudice or wrongdoing on the part of the jury. None evinces any concern that punitive awards be predictable or consistent with other similar cases. Indeed, in *Huckle*, *supra,* a printer who was detained under an illegal general warrant was awarded 300 pounds. John Wilkes, who was detained under the same warrant won 1,000 pounds in *Wilkes v. Wood, supra*. Wilkes later won a verdict of 4,000 pounds in an action against Lord Halifax arising out of the same incident. *Wilkes v. Halifax*, 19 How. St. Tr. 1406 (C.P. 1769).

This Court has indicated that the various formulations of excessiveness courts have traditionally employed are "rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-2792, 61 L. Ed.2d 560 (1979) (whether "no rational trier of fact could have" reached the same verdict). *Oberg* at 432 n.10. At the same time, the Court has rejected the notion that the due process clause imposes a reasonableness standard. *See TXO, supra,* at 458 ("we do not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award.")

Petitioner relies heavily on this Court's statement in *BMW* that due process entitles a defendant to notice that not only is conduct subject to punitive damages, but also its amount. Pet. Brief at 11. ATLA submits that BMW cannot be stretched to confer a due process right to limit punitive damages to an objectively predictable level.

BMW was held liable for selling a car as new without disclosing that it had been repainted. No evidence was presented the this conduct was illegal in any state. In fact, BMW had complied with requirements in a large number of states that appeared to offer a safe harbor from liability. Nor had Alabama previously imposed punitive damages in similar circumstances. 517 U.S. at 563-570. It was a fair question whether an out-of-state manufacturer had notice that it might be subject to substantial punitive damages for this conduct.

That type of fundamentally fair notice is a far cry from the objective standard of predictability urged by Petitioner in this case. Cooper's position is more closely analogous to the defendant in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), whose misconduct was not legal or protected in any jurisdiction but was stopped by plaintiff before it caused a large amount of actual damages. Admittedly, Cooper did not have a precise enough figure to determine whether it could proceed with its plans and make a profit despite a liability award. However, has the Court in *TXO* made clear, due process does not require that degree of predictability:

> [Punitive damage] awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make. . . . [W]e are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards."

B. Jury Consideration of Relevant Factors Would Satisfy Due Process Concerns.

Why are awards so erratic and unpredictable that, in Petitioner's view, they violate defendants' substantive due process rights? Petitioner's chief criticism of the present system is that juries do not consider factors that this Court identified in *BMW* as relevant to the reasonableness of awards. Specifically, the jury "neither considered nor should have considered in its deliberations" the degree of reprehensibility of the defendant's misconduct, the ration between the punitive and compensatory award, and the possible criminal or civil penalties for such conduct. Pet. Brief at 8.

ATLA agrees that the BMW factors are relevant to an appropriate assessment of punitive damages. It does not follow, however, that due process demands that they be applied de novo by federal appellate courts. Indeed, there is no federal constitutional right to appellate review at all. *Pennsylvania v. Finley,* 481 U.S. 551, 555-58 (1987); *Abney v. United States,* 431 U.S. 651, 656 (1977). Nor is there any principled reason to limit the benefit of their application to those parties who take their cases to the courts of appeals.

ATLA agrees with Justice O'Connor's observation, that "giving these factors to juries would substantially enhance the fairness and rationality of the state's punitive damages system." *Haslip*, 499 U.S. 1 at 57 (O'Connor, J., dissenting) (referring to factors established by Alabama court).

More importantly, as the Fourth Circuit has held, if such factors are to be considered at all on appeal, the Seventh Amendment *requires* that they be submitted to the jury in the first instance. A federal court "cannot consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial or

on a legal standard not given to the jury." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991).

Petitioner is wrong in its assertion that juries cannot or should not apply the *BMW* factors.

The "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." BMW at 575. This determination is clearly appropriate for the jury, which acts as the conscience of the community in imposing punitive damages for "reprehensible conduct." *IBEW v. Foust*, 442 U.S. 42, 48 (1979). *see also Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) ("Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community.") (citing Oliver W. Holmes, Collected Legal Papers 237 (1920)).

Petitioner's assertion that juries are not competent to assess the degree of reprehensibility is refuted by the very study petitioner relies so heavily upon. In that study, researchers found that the "jurors" were remarkably consistent their determinations ranking reprehensibility.

> Our first question was whether the degree of outrage is consistent across individuals and across possible juries. A simple way to answer this question is to examine whether rankings of different scenarios are generally similar for different demographic groups. .
> .
>
> The correlations were remarkably high for judgments both of outrage and of punitive intent. In particular, there was essentially perfect agreement among groups in the ranking of cases by punitive intent: the median correlation was .99. Men and

> women, Hispanics, blacks, and whites, and respondents at very different levels of income and education produced almost identical orderings of the twenty-eight scenarios used in the study. Judgments of intent to punish in these personal injury scenarios evidently rest on a bedrock of moral intuitions that are broadly shared in society. We also looked for differences among groups in the average severity of their judgments (in absolute terms, as opposed to their rankings), and here too found no significant differences . . .

Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2097-98 (1998).

The ratio between compensatory and punitive damages, is clearly question of fact that the jury may be instructed to consider. Despite its superficial appearance of precision, however, this numerical ratio is the weakest factor in making punitive damage awards consistent and predictable. The variation in the awards upheld by this Court demonstrate that this factor is easily outweighed by other relevant circumstances. *Compare Haslip*, supra (ratio of four to one upheld) and *TXO, supra* (526 to one ratio upheld).

To the extent that other civil and criminal penalties that may be applicable to defendant's conduct are relevant to the assessment of punitive damages. there is no bar in federal court to a defendant's presentation of such evidence. Some states expressly provide for such evidence by statute or court decision. *See, e.g.*, Ore. Rev. Stat. § 30.925(3)(g) (1991) (in assessing punitive damages in product liability actions, the jury is to consider the "total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."); *Tuttle v. Raymond*, 494 A.2d

1353, 1356 (Me. 1985) (defendant entitled to present factfinder with evidence of any criminal punishment imposed as mitigating factor); *Cheevers v. Clark,* 449 S.E.2d 528 (Ga. App. 1994) (defendant in personal injury suit seeking punitive damages for harm caused by drunk driving was permitted to read to the jury the criminal penalties applicable if he were prosecuted).

Indeed, the Fourth Circuit has properly noted that these item should be given to the jury. *Mattison, supra.. See also,* Charles Jared Knight *State-Law Punitive Damage Schemes And The Seventh Amendment Right To Jury Trial In The Federal Courts*, 14 Rev. of Litig. 657, 698-703 (1995) (endorsing *Mattison*).

If such evidence is relevant in this case , Petitioner can scarcely claim that it was deprived of due process because it chose not to proffer the evidence at trial.

II. THE SEVENTH AMENDMENT BARS APPELLATE RE-EXAMINATION OF PUNITIVE DAMAGE JURY VERDICTS.

Petitioner proposes that, following a jury verdict assessing punitive damages and the district court's denial of a new trial on the basis of excessiveness, the parties would, essentially retry the issue of the amount of punitive damages to the court of appeals. Reviewing the jury's award de novo and applying an evolving set of factors based on the *BMW* guideposts.[4]

Such a re-examination of the jury's findings plainly violates the Seventh Amendment. This court has held that for

[4] Petitioner seeks entry of judgment by the appellate court. Remand for a new trial would be a pointless exercise in that the appellate court would have determined the appropriate amount of punitive damages based on factors not considered by the jury. See Amicus Brief of Product Liability Advisory Council at 8.

an appellate court to enter a judgment for an amount different from that found by the jury plainly violates the Seventh Amendment. A federal court may not, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, ... enter an absolute judgment for any other sum than that assessed by the jury." *Kennon v. Gilmer,* 131 U.S. 22, 30 (1889). Nor, for the same reason, may the court of appeals order the district court to enter judgment for such an amount. *Hetzel v. Prince William County,* 523 U.S. 208 (1998).

Petitioner asserts, however, that a jury's assessment of punitive damages, unlike its finding on liability or assessment of compensatory damages, is not protected by the Seventh Amendment.

In fact, the origin of the Seventh Amendment is intimately bound up with the jury's power and discretion to award punitive damages.

In 1762 the English Secretary of State Lord Halifax issued a warrant directing the King's messengers to "apprehend and seize, together with their papers," the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45." *See* Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 43 (1937). The ensuing controversy had dramatic impact on both sides of the Atlantic.

The North Briton had published an anonymous article harshly criticizing Prime Minister Grenville's address to Parliament and the administration's policies. The messengers arrested 49 persons, including John Wilkes, a popular member of William Pitt's opposition party in Parliament, who was the author. Many, including Wilkes, brought suit seeking damages for the deprivation of their rights.

The Wilkes affair generated a clutch of decisions, primarily by the Lord Chief Justice Pratt, establishing the

illegality of general warrants and the authority of juries to award exemplary damages to punish and deter such oppression. *See Huckle v. Money,* 2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763); and *Wilkes v. Wood*, Lofft 1, 98 Eng.Rep. 489 (C.P.1763); *Money v. Leach,* 19 How. St. Tr. 1001, 97 Eng. Rep. 1075 (C.P. 1764); *Beardmore v. Carrington,* 19 How. St. Tr. 1405, 95 Eng. Rep. 790 (C.P. 1764); *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765). By the time all the judgments were satisfied, the Crown had paid out an estimated 100,000 pounds. Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 45 (1937).

There can be little doubt that *Wilkes v. Wood* and the other punitive damages cases were a major impetus to the adoption of the Seventh Amendment. The colonists in America closely followed the developments in the Wilkes affair. Indeed, the American press devoted so much attention to his trials, tribulations and speeches that "one may go to almost any issue of any newspaper between 1763-1775 and read of John Wilkes." Clinton Rossiter, Seed-time of the Republic 527 n.158 (1953). Between June 1763 and May 1764 the weekly Boston Gazette, and Country Journal carried 36 separate stories about Wilkes.

The jury verdict in *Wilkes v. Wood* was widely celebrated. One newspaper account proclaimed: "By this important decision, every Englishman has the satisfaction of seeing, that his house is his castle, and is not liable to be searched, nor his papers pried into by the malignant curiosity of King's Messengers, and an utter end put to that unconstitutional practice." Boston Gazette, and Country Journal, Feb. 20, 1764, at 4, col. 1. *See* Eric Schnapper, *Unreasonable Searches And Seizures Of Papers,* 71 Va. L. Rev. 869, 876 (1985). Accounts of the Wilkes cases appeared in newspapers and pamphlets appeared throughout in the colonies several years before the official case reports were published. Thomas Y. Davies, *Recovering The Original Fourth Amendment,* 98

Mich. L. Rev. 547, 564-65 & n.25 and 631 n.222 (1999).

Wilkes v. Wood "was probably the most famous case in late eighteenth century America, period." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994). This Court has recognized that the principles adopted in the Wilkes cases were in the minds of those who drafted the Bill of Rights. *Boyd v. United States,* 116 U.S. 616, 626-27 (1886). It has been suggested that the language of Wilkes v. Wood influenced the text of the Fourth Amendment. Akhil Reed Amar *The Bill Of Rights As A Constitution,*: 100 Yale L.J. 1131 (1991).

The jury's discretionary power to determine the amount of punitive damages cannot be severed from the Seventh Amendment. It was the colonists' desire to preserve that authority which gave impetus to the adoption of the Seventh Amendment, and thus to ratification of the constitution itself. See, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991).

Most significantly, the drafters of the Seventh Amendment were especially intent on preserving that authority of the civil jury from encroachment by federal appellate judges. Such encroachments were the subject of increasingly bitter complaints by the colonists during the years running up to the American Revolution. Colonial judges did not enjoy the relative independence enjoyed by judges in England after the Glorious Revolution. They were beholden to the Crown and could be expected to favor the King's interests. The American colonists therefore looked to local juries for protection against the autocratic power of British judges. Repeated interference with the colonists' right to jury trial was "one of the important grievances leading to the break with England." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 340 (1979) (Rehnquist, now C.J., dissenting).

Not only did the Crown transfer criminal and civil actions to enforce its oppressive Acts from colonial juries to juryless vice admiralty courts, the colonists also complained against appellate review by the Privy Council in London, which claimed the authority to disallow acts of colonial legislatures and overturn verdicts of colonial juries and judgments of colonial courts. 1 Homer Carey Hockett, The Constitutional History Of The United States 55 (1939) (Council reviewed some 265 colonial cases); Roscoe Pound, The Development Of Constitutional Guarantees Of Liberty 77 (1957). The Council rejected attempts by the colonies to preserve the finality of their own judicial judgments, reviewing some 50 cases on petition after colonial courts had refused to grant leave to appeal. See Hockett, supra, at 55 n.12.

When the Constitutional Convention finished its work, fact that it not only failed to preserve the right to trial by jury in civil cases, but affirmatively conferred on the Supreme Court appellate authority over law and fact, generated widespread demand for a Bill of Rights to preserve the civil jury from encroachment by federal judges. See antifederalists asserted that the constitution effectively abolished the civil jury. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450-51 (1996) (Scalia, J., dissenting).

The right to trial by jury was plainly designed to prevent the type of re-examination of jury verdicts that Petitioner seeks in this case. The Re-Examination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Justice Story ventured that this provision is "more important" than the preceding portion of the Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Re-Examination Clause is a prohibition on "the indirect impairment of the right of trial by jury through judicial re-

examination of factfindings of a jury other than as permitted in 1791." *Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

Petitioner's reliance on a sentence from Justice Scalia's dissent in Gasperini for the proposition that the Seventh Amendment does not apply to jury verdicts for punitive damages is misplaced. Pet. Brief at 29. As Justice Scalia wrote separately in *Tull v. United States*, 481 U.S. 412 (1987), "I can recall no precedent for judgment of civil liability by jury but assessment of amount by the court. Even punitive damages are assessed by the jury when liability is determined in that fashion. 481 U.S. at 228 (Scalia, J., concurring in part and dissenting in part).

The entire Court subsequently clarified Tull, holding that where the Seventh Amendment guarantees the right to a jury trial on liability, it also guarantees a jury determination of damages. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). Erasing any doubt that the Seventh Amendment guarantee includes punitive damages, the Court cited not only *Huckle v. Money* and *Wilkes v. Wood*, but also the early American cases upholding punitive damage awards, *Genay v. Norris*, 1 S.C.L. 6, 7 (1784) and *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791). 523 U.S. at 353.

Well before *Feltner*, the federal courts of appeals had explicitly recognized that the Seventh Amendment protects the right to a jury determination of the amount of punitive damages. *See, e.g., Defender Indus., Inc. v. Northwestern Mut. Life Ins.*, 938 F.2d 502, 507 (4th Cir. 1991) (en banc) (holding that the Seventh Amendment protects the right to a jury determination of punitive damages); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447-48 (10th Cir. 1987) (same); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391-92 (7th Cir. 1984) (same).

Petitioner's assertion that a court may substitute its own determination of the proper amount of punitive damages

for the jury's verdict without violating the Seventh Amendment is wholly without basis.

III. DE NOVO APPELLATE REVIEW TO MAKE PUNITIVE DAMAGE PREDICTABLE IN AMOUNT UNDERMINES THE STATE'S INTEREST IN DETERRING TORTIOUS MISCONDUCT.

Petitioner and supporting amici fail to recognize the distinction between setting aside a jury verdict that is so excessively high that no rational jury could have arrived at such a result, and substituting a more "reasonable" amount for that determined by the jury. Pet. Brief at 10. The former involves setting aside an action by a jury that is so clearly irrational that the jury has not returned a legal verdict at all, and the matter may be submitted to a new trier of fact. The latter situation requires the court to impose its own substantive values to arrive at a "reasonable" verdict. Those substantive values represent policy decisions reserved to the State whose law governs the action. Punitive damages serve the state's interests in punishing and deterring conduct it deems especially unacceptable. Any modification or reversal of the policies the State chooses to advance those interests must be left to the State, not impose by the federal judiciary. As this Court drew this distinction clearly in *Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989):

> Although petitioners and their amici would like us to craft some common law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state law and federal law

> issues. For obvious reasons we decline that invitation.

Id. at 279.

A concrete illustration of this point is the State's interest in deterrence. Many states adopt the classic view that "the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine." *Tuttle v. Raymond,* 494 A.2d 1353, 1359 (Me. 1985). Companies cannot simply factor the expected cost of punitive damages into the price of goods and services. "If punitive damages are predictably certain, they become just another item in the cost of doing business." *Palmer v. A.H. Robins Co.,* 684 P.2d 187, 218 (Colo. 1984).To review punitive awards with the aim of making them fairly predictable is to undermine the state's interest in deterring conduct which is unlawful but profitable. *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 664, 512 A.2d 466, 477 (1986) (where the amount of damages can be anticipated, "the risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.") "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages." *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989), passing along the cost to the very consumers who are endangered.

Due process surely does not require federal courts to transform punitive damages into, in effect, a user fee.

Some states may take a different view. A state may cap punitive damages, choosing instead to rely on criminal or regulatory enforcement. Another may impose other restrictions designed to be consistent with the Law and Economics theory of "overdeterrence." Yet another may fix punitive awards at a multiple of compensatory damages, representing a policy of providing an incentive for private

enforcement. Cf. *American Society of Mechanical Engineers,* 456 U.S. 556, 575 (1982) (treble damages provide an incentive for litigants to bring private civil suits under the antitrust laws.

One need not agree with the wisdom of any of these policies to recognize that they are state policies. Permitting federal appeals judges to impose their own economic policies on substantive due process grounds "would be Lochnerism on a massive scale." Alan Howard Scheiner, *Judicial Assessment Of Punitive Damages, The Seventh Amendment, And The Politics Of Jury Power,* 91 Colum. L. Rev. 142, 182 (1991).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ARTHUR F. McEVOY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the federal appellate courts should apply in the punitive damages context the standard of appellate review that traditionally has been used in both criminal and civil litigation when one party argues that the result reached by the jury is not sustainable under the relevant law on the particular record of the case: the "rational factfinder" standard.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, Arthur F. McEvoy, is a law professor who appeared as an *amicus* in the last major case in which this Court grappled with the proper scope of federal appellate review of jury damage awards, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). He served as lead counsel on an *amicus* brief cited by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994). His qualifications are listed in the Appendix.[1]

Amicus filed a brief at the certiorari stage of this case urging review of the conflict among the federal circuit courts of appeals regarding the proper scope of appellate review for jury-awarded punitive damages. That brief framed the question presented as "whether to apply in the punitive damages context the standard of appellate review that has traditionally been used in all other contexts — in both criminal litigation and civil litigation alike — when one party argues that the result reached by the jury is not sustainable on the particular record of the case." Brief of Erwin Chemerinsky and Arthur F. McEvoy as *Amici Curiae* in Support of Petitioner, filed Aug. 3, 2000 ("Cert. *Amicus* Br."), at 1.

In particular, *amicus* argued that in reviewing substantive due process attacks on jury-awarded punitive damages, federal appellate courts should apply the "rational factfinder" standard set out in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), drawing all reasonable inferences in favor of the jury's verdict, but affording no deference to the district court's analysis of the matter. He demonstrated that this standard has been consistently employed by this Court and the lower federal courts to measure a jury verdict's conformity with applicable law not simply concerning criminal liability (at issue in *Jackson*), but also concerning civil liability and civil damages and penalties, including compensatory damages and punitive damages. Cert. *Amicus* Br. at 4-12.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae* and his counsel, made a monetary contribution to the preparation or submission of this brief.

This position has been criticized in the brief of petitioner Cooper Industries, Inc. ("Cooper"), and in two *amicus* briefs filed in support of Cooper submitted by counsel who represented the defendants in the last three punitive damages cases heard by this Court. *See* Pet. Br. at 26 & n.20; Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner ("Chamber of Commerce Br.") (submitted by Andrew L. Frey) at 9-21; Brief of *Amicus Curiae* The Association of American Railroads in Support of Petitioner "(Railroads Br.") at 24-27 (submitted by Carter G. Phillips). This brief answers those criticisms.

In the view of *amicus*, due process is fully satisfied, and the distinct roles of the trial judge and appellate judge in reviewing jury verdicts are appropriately respected, by adherence in the punitive damages context to the "rational factfinder" standard that is traditionally used on appeal when the loser of a jury trial argues that the result reached by the jury violates applicable law. On a substantive due process challenge to a punitive damage award such as that made by Cooper in this case, appellate judges should leave evaluation of the weight of the evidence to the jury and trial judge. Thus, an appellate attack on the size of any jury verdict should be evaluated using an objective, "bottom-line test" under which "the verdict is evaluated against the evidence" to determine if it is "rational." *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182, 186 (7th Cir. 1997) (Posner, C.J.). This test is used by most federal appellate courts that have addressed the issue, *see* Cert. *Amicus* Br. at 4-6, as Cooper and its *amici* have not disputed.

Any other course would seriously disrupt the existing framework for federal judicial review of jury verdicts. In particular, granting the request for appellate scrutiny of jury verdicts that is more intrusive than the "rational factfinder" standard would engage the federal appellate courts in weight-of-the-evidence review of jury verdicts that is forbidden by the Seventh Amendment, that has never been authorized by Congress, and that would be enormously inefficient.

ARGUMENT

I. THE "RATIONAL FACTFINDER" STANDARD IS THE PROPER STANDARD FOR APPELLATE REVIEW OF WHETHER A JURY'S PUNITIVE DAMAGE AWARD VIOLATES FEDERAL SUBSTANTIVE DUE PROCESS

At the certiorari stage, *amicus* noted that the federal circuit courts of appeals have articulated three different approaches to the appellate review standard for a substantive due process objection to a punitive damage award. Six circuits appear to have specifically addressed this issue. Four of the circuits use a standard akin to the "rational factfinder" standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), asking whether the amount of the award is rationally supportable on the record. *See* Cert. *Amicus* Br. at 4-6 (citing *Strauss v. Stratojac Corp.*, 810 F.2d 679, 686 (7th Cir. 1987); *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1266 (8th Cir.), *cert. denied*, 513 U.S. 989 (1994); *Lee v. Edwards*, 101 F.3d 805, 808-13 (2d Cir. 1996); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)). This is the view that *amicus* defends.

Another approach, adopted solely by the Eleventh Circuit, involves a curious hybrid review standard. It combines the *Jackson* "rational factfinder" test with deference to any findings made by the district court on posttrial review of the substantive due process issue. Any such findings are treated as if they had been made in a bench trial, so that they are reversible on appeal only if found "clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a). *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). As *amicus* has pointed out, *see* Cert. *Amicus* Br. at 13-15, this hybrid review standard is conceptually inappropriate, and this Court has rejected a proposed borrowing of the Rule 52(a) standard in another context involving review of jury verdicts. *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992). This standard is also pragmatically indefensible, risking both erroneous approval of irrational jury verdicts and undue interference with

rational jury verdicts. Neither Cooper nor its *amici* answer these objections, or advocate the Eleventh Circuit's approach; indeed, *Johansen* is not even cited in Cooper's brief.[2]

Instead, the alternative to *Jackson*'s "rational factfinder" standard being urged on this Court is the third approach followed in the lower federal courts: the approach recently adopted by the Third Circuit in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 791 (2000). Under this approach, federal appellate judges play "[t]he role of gatekeeper" over sizable punitive damage awards and decide what is "the proper, reasonable, punitive damages award" with little if any deference to the jury or the district judge. *Id.* at 450, 468. *See also* Cert. *Amicus* Br. at 15-16. Cooper and several of its *amici* advance this approach.[3] Their arguments are flawed in several key respects.

A. The "Rational Factfinder" Standard Is the Tool Traditionally Used by Appellate Courts to Ensure That Jury Verdicts Comply With Substantive Law

Cooper and its *amici* contend that the "rational factfinder" standard is utterly inapposite in a case such as this, involving

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[2] Two of the ten *amicus* briefs filed in support of Cooper discuss in passing the review standard set out in *Johansen*, but neither brief addresses the two basic objections of *amicus* to *Johansen* that were set out at the certiorari stage, as just summarized. *See* Chamber of Commerce Br. at 21, 25-27; Brief *Amicus Curiae* of Product Liability Advisory Council, Inc., in Support of Petitioner ("PLAC Br.") at 15-16.

[3] For example, one of the *amicus* briefs, urging "the need for meaningful appellate scrutiny" of punitive damage awards, cites the Third Circuit's *Inter Medical Supplies* decision in support of the argument that "little deference to trial courts or juries" is owed in this context. Chamber of Commerce Br. at 3, 21 (citing 181 F.3d at 469). *See also* Pet. Br. at 13, 26 n.20 (arguing for "rigorous appellate review" of punitive damage verdicts and rejecting the "rational factfinder" test); Railroads Br. at 18, 25-27 (arguing that appellate courts must conduct a "rigorous and independent evaluation" of the size of a punitive damage verdict and rejecting the "rational factfinder" test).

appellate review of Cooper's substantive due process argument that the jury's punitive damage award is too large. In their view, the "rational factfinder" standard "is a sufficiency-of-the-evidence standard for criminal trials under the Due Process Clause" that "is simply a fish out of water" in this context. Railroads Br. at 25, 27. *See also* Pet. Br. at 26 n.20 (objecting to proposal "modeled after the test governing evidentiary sufficiency challenges to criminal convictions"); Chamber of Commerce Br. at 11 (arguing that to use "*Jackson*'s rational juror standard" in this context "is misguided" because "it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found").

To the contrary, the "rational juror" standard, which calls for an objective analysis of the record evidence under the governing substantive law of damages, is perfectly suited to appellate review of objections to the size of a jury's damage award, a matter that Chief Judge Posner has given careful attention in several decisions dating back to 1983. The Chamber of Commerce is correct in observing (at 11) that where the jury renders a general verdict awarding damages, it is not possible to tell what particular facts the jury found, or what relative weight it gave to the facts it found. But this circumstance is precisely what calls for use of the "rational juror" standard. "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

> The law neither requires juries to state reasons for their verdicts nor permits courts to inquire into the reasoning process of the jurors for the purpose of impeaching their verdict. . . . The law applies a bottom-line test: the verdict is evaluated against the evidence, rather than against the likelihood that the jury arrived at the verdict by the "rational" process that a judge would employ. It is enough (this is implicit in the bottom-line test) that a

> rational jury could have come to such a verdict . . .; it is a test of the reasonableness of the result rather than the reasonableness of the process that led to the result.

Outboard Marine Corp. v. Babcock Indus., Inc., 106 F.3d 182, 186 (7th Cir. 1997) (Posner, C.J.) (citations omitted). Under this standard, as long as a jury verdict is "neither absurdly high nor absurdly low," it will be upheld on appeal. *Id.* at 186-87. *See also Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (Posner, C.J.); *Kasper v. St. Mary of Nazareth Hosp.*, 135 F.3d 1170, 1176-77 (7th Cir. 1998) (Posner, C.J.); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983) (Posner, J.).

Chief Judge Posner is hardly alone in this view. As already noted, *see* Cert. *Amicus* Br. at 4-6, 8-9, 11-12, there is ample precedent both from this Court and from the lower federal appellate courts for using the "rational factfinder" standard to judge a jury verdict's conformity with applicable law in civil litigation on both liability and damages, including punitive damages. Cooper and its *amici* largely ignore this precedent.

To be sure, the "rational factfinder" label originated in the criminal law context, in which the validity of the substantive result reached by a jury is frequently challenged by defendants. In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court held that where a defendant challenges the adequacy of the evidence introduced at trial, the proper test on appellate review (and on habeas review of state court proceedings) is whether "a rational factfinder" could have arrived at the jury's result under the governing law and facts. *Id.* at 317-20, 324. *Jackson*'s "rational factfinder" test is an objective one that focuses on the corpus of evidence that was before the jury. It "does not permit a court to make its own subjective determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached" based on "scrutiny of the reasoning process actually used by the factfinder — if known." *Id.* at 319-20 n.13.

"This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to

weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. The question it poses to a reviewing court is simple. "Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not." *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

Jackson involved the review of evidentiary sufficiency to sustain a criminal conviction, but a close variant of the *Jackson* standard has traditionally applied to appellate review of liability determinations in civil litigation as well. This Court articulated the general approach decades ago as follows:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

Brady v. Southern Ry., 320 U.S. 476, 479-80 (1943).

This Court introduced *Jackson*'s "rational factfinder" language into the summary judgment context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), stating that, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and emphasizing that the inferences that may be drawn from the facts must be "'viewed in the light most favorable to'" the nonmovant. *Id.* at 587 (citations omitted). This Court held just last Term that the same test applies in reviewing a motion for judgment as a matter of law, in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), which calls for analysis of whether "no rational factfinder could" find as did the jury. *Id.* at 2109. In doing so, this Court clarified that under the "rational factfinder" standard, "the court

should review all of the evidence in the record," but it "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 2110. In civil litigation, the lower federal appellate courts routinely refer to the "rationality" of a finding of liability when they analyze the record evidence in reviewing district court rulings on motions for summary judgment and judgment as a matter of law.[4]

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[4] *See, e.g., Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994); *Alvarez-Crespo v. Olavarria-Rivera*, 994 F.2d 35, 36 (1st Cir. 1993); *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998); *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 107-08 (2d Cir. 1997); *United States v. 121 Allen Place*, 75 F.3d 118, 120-21 (2d Cir. 1996); *Doby v. Decrescenzo*, 171 F.3d 858, 873-74 (3d Cir. 1999); *In re Merritt Logan, Inc.*, 901 F.2d 349, 366 (3d Cir. 1990); *Roebuck v. Drexel University*, 852 F.2d 715, 730 (3d Cir. 1988) (Becker, J.); *Smith v. American Nat'l Red Cross*, 1992 WL 357850, at *2 (4th Cir. 1992); *Thomas v. Texas Dep't of Crim. Justice*, 220 F.3d 389, 392 (5th Cir. 2000); *Waymire v. Harris County*, 86 F.3d 424, 428 (5th Cir. 1996); *Gulf South Medical & Surgical Inst. v. Aetna Life Ins. Co.*, 39 F.3d 520, 521 (5th Cir. 1994), *cert. denied*, 516 U.S. 814 (1995); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 187 (5th Cir. 1995); *Premier Bank v. Mosbacher*, 959 F.2d 562, 566 (5th Cir. 1992); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998); *Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1069-70 (6th Cir. 1991); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 498 (7th Cir. 2000) (Easterbrook, J.); *Tuohey v. Chicago Park Dist.*, 148 F.3d 735, 740 (7th Cir. 1998); *Pierce v. Atchison T. & S.F. Ry.*, 110 F.3d 431, 438 (7th Cir. 1997); *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 815 (7th Cir. 1994) (Posner, C.J.); *In re Wade*, 969 F.2d 241, 248 (7th Cir. 1992); *Gremmels v. Tandy Corp.*, 120 F.3d 103, 105 (8th Cir. 1997); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1179 (9th Cir. 1999); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (Kozinski, J.), *cert. denied*, 515 U.S. 1159 (1995); *Taylor v. List*, 880 F.2d 1040, 1044-45 (9th Cir. 1989); *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1121 (11th Cir. 1997); *T. Harris Young & Assocs., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 821, 828 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991).

The "rational factfinder" standard also appears at the penalty stage in criminal proceedings. For example, in the capital punishment context, in deciding whether the record supports a finding of a particular death-qualifying "aggravating circumstance," the "appropriate standard of review is the 'rational factfinder' standard established in *Jackson*." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). *See also id.* at 781-84; *Sawyer v. Whitley*, 505 U.S. 333, 339-41, 345-47 & n.14 (1992) (citing *Jackson* in reference to the "innocent of death" doctrine in the context of successive habeas claims).

In a related vein, in reviewing whether particular criminal sentences are in violation of the Eighth Amendment's ban on "cruel and unusual punishments," this Court treats the issue as "legal" in nature, reviewable *de novo*, with no particular deference to the trial court's view of the matter. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 985-90, 994-96 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.); *id.* at 996, 1001-08 (opinion of Kennedy, J., joined by O'Connor and Souter, JJ.); *Solem v. Helm*, 463 U.S. 277, 283, 290-300, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 275-82 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958); *Weems v. United States*, 217 U.S. 349, 362-68, 377, 380-82 (1910).[5] The Court has adopted a similar review standard with respect to criminal forfeitures. *United States v. Bajakajian*, 524 U.S. 321, 336-37 & n.10 (1998).

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[5] The federal circuit courts of appeals have understood that the review of Eighth Amendment challenges is to be conducted *de novo*. *See, e.g., United States v. Flowal*, 163 F.3d 956, 963 (6th Cir. 1998), *cert. denied*, 526 U.S. 1093 (1999); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998); *United States v. DeLuca*, 137 F.3d 24, 40 n.19 (1st Cir.), *cert. denied*, 525 U.S. 874 (1998); *Leslie v. Doyle*, 125 F.3d 1132, 1134 (7th Cir. 1997); *United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, 511 U.S. 1041 (1994).

In reviewing whether particular instances of civil fines are constitutionally excessive, this Court has also treated the issue as "legal" in nature and reviewable *de novo*, with no particular deference to the views of lower courts or administrative agencies concerning the ultimate constitutional issue of excessiveness. *See, e.g., St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909).

Likewise, the "rational factfinder" standard has long been used by the lower federal appellate courts in reviewing attacks on the size of a jury's compensatory damage award. Even during the 1960s, when the existence of any federal appellate authority to review excessiveness claims was a matter of considerable dispute,[6] the Fifth Circuit emphasized that the function of appellate review in this context was to decide whether the district court had abused its discretion in upholding a verdict that was without rational support on the record. In *Glazer v. Glazer*, 374 F.2d 390 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967), the court struck down a $1.9 million compensatory award for breach of contract. In doing so, it stated that the district court had abused its discretion because "[t]he verdict was excessive *as a matter of law* in that it exceeds any *rational* appraisal or estimate of the damages that could be based upon the evidence before the jury." *Id.* at 413 (emphasis added).[7] At least several

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[6] *See, e.g., Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir.) (Blackmun, J.), *cert. denied*, 369 U.S. 929 (1961). *See also* Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner, in *Gasperini v. Center for Humanities*, No. 95-719 (filed March 1, 1996) (hereinafter "*Gasperini Amicus* Br.") at 6-11.

[7] A linkage between the "abuse of discretion" label for review of an order on a motion for a new trial and the "rational factfinder" substance of the review of a compensatory damages award has persisted to this day. *See, e.g., Mejias-Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 427-29 (1st Cir. 1997)

circuits currently apply the "rational factfinder" standard in reviewing attacks on the size of a jury's compensatory damage verdict. *See Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 201-02 n.21 (4th Cir. 2000); *Smith v. Kmart Corp.*, 177 F.3d 19, 29-30 (1st Cir. 1999); *Anthony v. G.M.D. Airline Servs., Inc.*, 17 F.3d 490, 493 (1st Cir. 1994); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 517 (7th Cir. 1993); see also pp. 5-6, *supra* (Seventh Circuit).

Finally, as already noted, in the review of attacks on the size of jury-awarded punitive damages, most lower federal appellate courts that have explicitly addressed the issue use the "rational factfinder" standard. See pp. 3-4, *supra*. This approach has solid support in this Court's decisions during the past decade

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(stating that under the abuse-of-discretion review standard set out in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), a district court's denial of a new trial on damages will be overturned "only if the damages awarded lack 'a rational basis in evidence,'" and concluding that the $25,000 award for medical expenses "lacked any rational basis" in the record) (citation omitted); *Air Safety, Inc. v. Roman Catholic Archbishop*, 94 F.3d 1, 4 (1st Cir. 1996) (stating that the proper scope of review "is narrow" and that "an abuse of discretion" cannot be found where "the jury award has a rational basis in evidence") (citation omitted).

Amicus agrees with the analysis of one of Cooper's *amici* that it is the substance of the appellate review standard, not the label, that matters. *See* Railroads Br. at 15, 17-18. The disagreement is over what the substance of that review should be. The Railroads Br. at 18, 25-27, argues that, in substance, a federal appellate judge should conduct a "rigorous and independent evaluation" of the size of a punitive damage verdict. The view of *amicus* is that such review involves a prohibited reweighing of the evidence, and that the substance of appellate review must be limited to an analysis of whether a rational factfinder could on the trial record have awarded the amount of punitive damages awarded by the jury, under the guideposts identified in *BMW v. Gore* and other legal considerations. If *amicus* is correct, what label is attached to such review is not particularly important. As Judge Easterbrook has suggested in a somewhat similar context, when the bottom-line issue is the rationality of the jury's verdict on the record evidence, a judge might "take Occam's Razor and slice off unnecessary steps and proceed directly to the question whether the evidence would permit a rational trier of fact to conclude" as did the jury. *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997).

addressing federal substantive due process challenges to punitive damage awards. In all three cases, the Court reviewed the "gross excessiveness" issue just as it reviews issues raised by summary judgment motions or motions for judgment as a matter of law (most recently illustrated by last Term's *Reeves* decision): as a "legal" one, reviewable with the record read in the light most favorable to the jury's verdict, with no particular deference to the views of the lower courts. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-86 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458-62 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co. v. Haslip*, 400 U.S. 1, 12, 18-24 (1991).

Further, in a decision holding that some degree of judicial review of the size of punitive damage awards is required by the Due Process Clause of the Fourteenth Amendment, this Court strongly implied that *Jackson*'s "rational factfinder" standard is the appropriate standard for reviewing "gross excessiveness" claims. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 & n.10 (1994) (citing *Jackson*, 443 U.S. at 324). Indeed, review of a jury verdict's rationality under the *Jackson* standard is exactly the standard that the petitioner in *Oberg* sought to have instituted. Tr. of Oral Argument in *Honda Motor Co. v. Oberg*, No. 93-644 (Apr. 20, 1994), 1994 U.S. Trans. LEXIS 150, at *13-14 (questioning by Justice O'Connor as to "why should the constitutionally mandated review be any more than is required in a criminal case" under "the *Jackson* standard," leading petitioner's counsel Andrew L. Frey to state: "I have no problem with that standard. That's what we would like to see the Court supply.").

The position that a "rational factfinder" standard governs appellate review of punitive damage awards was also advanced in one of the principal *amicus* briefs filed on behalf of the petitioner in *Oberg*, submitted by the late Dean Griswold. That brief suggested that "courts should be required to consider whether a particular award is rationally related to the goals of deterrence and punishment." Brief *Amici Curiae* for the American Council of Life Insurance, et al., in No. 93-644 (filed

Feb. 28, 1994) at 13-14. Further, Dean Griswold urged that "to ensure that courts consult something other than their own preconceptions in evaluating the rationality of such awards, courts should be required to consider certain objectively measurable indicia of what amounts are reasonably necessary to serve the goals of deterrence and punishment," in the form of "a non-exclusive list of factors" for courts to consider in analyzing the rationality of an award. *Id.* at 14. This Court took that course two years later in *BMW v. Gore*.

B. The "Rational Factfinder" Standard is Easily Administrable in the Punitive Damages Context

In sum, a considerable body of precedent holds that when a criminal or civil litigant has lost a jury trial and has failed on all *procedural* objections to the trial (e.g., claims of evidentiary or instructional error), on appeal the litigant's objection to the *substance* of the jury's holding — whether on liability or damages — should be evaluated under a "rational factfinder" standard, with all reasonable inferences drawn in favor of the jury's verdict, thereby leaving the evaluation of the weight of the evidence to the jury (through its verdict) and the trial judge (through his or her "thirteenth juror" role on posttrial motions).[8]

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[8] One of Cooper's *amici* argues that the "rational factfinder" standard of appellate review that *amicus* advocates would somehow strip a federal district court of its power, "in disposing of a Rule 59 motion, . . . to reweigh the evidence, drawing its own inferences and assessing witness credibility." Railroads Br. at 25. To the contrary, the *amicus* brief at the certiorari stage explicitly noted that the use by federal appellate courts of the "rational factfinder" review standard leaves undisturbed the district courts' "broad authority to grant new trials, both as to liability and damages, through the exercise of their power to sit as the 'thirteenth juror,' weighing the evidence to decide whether a new trial is in the interests of justice." Cert. *Amicus* Br. at 14 n.7. The strong concern expressed therein with ensuring that the federal appellate courts *do not* unduly interfere with the district courts' exercise of their "thirteenth juror" role is illustrated by the citation to the brief that *amicus* and other scholars submitted to this Court in *Gasperini*, arguing that the power to alter jury verdicts based on a weight-of-the-evidence analysis is exclusive

In an effort to exempt the field of punitive damages from the operation of this traditional, commonsense review standard, Cooper's *amici* rely on dicta in this Court's decision in *Tull v. United States*, 481 U.S. 412, 425-27 & n.9 (1987), to suggest that a jury's decision about how much in punitive damages is needed to deter and punish a defendant's wrongdoing is too "highly discretionary" to count as a "factual" finding that need be made by a jury at all, or that can be meaningfully assessed under a "rational factfinder" standard. Railroads Br. at 10-11; PLAC Br. at 25 & n.10. But this *Tull* dicta would appear to be irrelevant in light of this Court's decision in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), not addressed by Cooper or its *amici*. In *Feltner* this Court recognized that historically "cases involving discretionary monetary relief," including punitive damage cases, "were tried before juries," and it stated that the *Tull* holding was limited to the determination of "the amount of civil penalties to be paid to the Government." *Id.* at 353, 355 (citing *Coryell v. Colbaugh*, 1 N. J. L. 77 (1791)). *See also* Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 Nw. U. L. Rev. 153, 154-56, 159-71, 176-86, 198-203 (1999).

The idea that it is somehow difficult to treat a jury award of punitive damages as a "factual" finding that is properly scrutinized by asking whether a rational factfinder could have awarded that amount on the record of the case, in light of the purpose of punitive damages to deter and punish wrongful conduct, is belied by actual litigation experience. As already noted, this Court and lower federal appellate courts have had no difficulty reviewing objections in particular cases that a given punitive damage award is grossly excessive in light of the trial court record and applicable legal guidelines, even after drawing all reasonable inferences in favor of the jury's verdict. See pp. 3, 11-12, *supra*.

The ease by which defendants can articulate a concise and coherent attack on the rationality of a given punitive damages

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to district judges and is effectively immune from control by appellate courts. *Id.* (citing *Gasperini Amicus* Br., *supra* note 6, at 4-11, 22-24).

verdict is illustrated by the argument that Exxon Corporation has made concerning the $5 billion in punitive damages awarded against it by a jury in the litigation brought by private parties in the aftermath of the *Exxon Valdez* oil spill. That award, which is currently on appeal in the Ninth Circuit, appears to be by far the largest punitive damage verdict ever appealed within the federal system. Exxon's appellate argument that the award is grossly excessive in violation of federal substantive due process is carefully focused on the issue of whether the award is *rational* on the record of the case, an argument that it forcefully advanced in only 40 pages of appellate briefing.[9] In making this argument, in its opening brief Exxon invoked this Court's holding "that punitive damages should be 'reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'"[10] In the first sentence of its reply brief, Exxon stated that it was invoking "the most basic legal requirement for punitive damages — that an award must be rationally related to society's purposes of deterrence and punishment."[11]

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[9] *See* Joint Opening Brief of Appellants Exxon Corporation and Exxon Shipping Company in *Baker v. Exxon Corporation* in 9th Cir. No. 97-35191 (filed June 30, 1997) at 26-31, 68-77; Joint Reply Brief (filed October 16, 1997) at 1-2, 23-26, 42-59.

[10] Joint Opening Brief at 26 (quoting *Haslip*, 499 U.S. at 9-12, 21-23, and citing *BMW v. Gore*, 116 S. Ct. at 1595).

[11] Joint Reply Brief at 1. The thrust of Exxon's argument is that its actions in connection with the oil spill amounted at most to a non-intentional tort, from which it did not profit but to the contrary had suffered a net $3.5 billion loss in cleanup costs, civil liabilities, criminal sanctions, and other expenses. Exxon argues that to force it to pay an additional $5 billion in punitive damages to plaintiffs who had suffered disruption caused by the oil spill (the environmental damage was excluded from consideration, having been addressed in earlier legal proceedings) could not rationally advance any legitimate objective of deterrence or punishment.

In particular, Exxon contends that the objective of deterrence was fully achieved by its incurring of $3.5 billion in spill-related costs, which plaintiffs

C. Due Process is More Than Satisfied By Appellate Review of Whether a Jury's Verdict is Rationally Supported on the Record Under Substantive Law

Apparently in support of its suggestion that the use of a "rational factfinder" review standard of appellate review would be unduly deferential to jury verdicts, one of Cooper's *amici* argues that due process requires "meaningful judicial scrutiny" on appeal. Chamber of Commerce Br. at 1-2. If construed to mean that due process compels an appellate court to do something more in a criminal or civil case besides ask itself if the result reached by the jury is rational based on the record evidence and pertinent legal considerations, this argument would entail sweeping consequences. This Court has never held that due process affords litigants any right of appeal at all. "[I]t is well settled that there is no constitutional right to an appeal," even in a criminal case. *Abney v. United States*, 431 U.S. 651, 656 (1977) (citing *McKane v. Durston*, 153 U.S. 684 (1894)). "[I]t was 100 years [after the founding of this nation] before the *defendant* in a criminal case, even a capital case, was afforded

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had "virtually concede[d]" was itself "enough to deter anyone from anything" (as the United States and the district court had agreed in earlier proceedings), deterrence that was confirmed by the fact that Exxon had already made sweeping changes in its operations in an effort to minimize the risk of similar accidents in the future. Joint Opening Br. at 27-28, 30-31; Joint Reply Br. at 1, 24-25. As to the objective of punishment, Exxon argues that this objective was fully satisfied by the imposition against Exxon of $125 million in criminal fines and restitution, "more than twice the aggregate of *all* amounts previously paid in criminal proceedings for environmental crimes," an amount that "represented the considered judgment of the Attorneys General of the United States and Alaska, speaking for the public, concerning what was necessary to achieve society's purposes of punishment and deterrence." Joint Opening Br. at 27-29. *See also* Joint Reply Br. at 25-26 (arguing that "the officials authorized to express and vindicate society's norms have already done so," with the consequence that "[t]he jury verdict here does not express society's official condemnation of Exxon; rather, it overturns the balanced judgment society made through its authorized representatives, and imposes a punishment 200 times greater than the criminal fine the real Attorneys General found appropriate and the court imposed").

appellate review as of right." *Carroll v. United States*, 354 U.S. 394, 400 & n.9 (1957) (summarizing the legislation creating a right of appeal). This initiative was quickly adopted in many states, but even today it appears that two states deny an appeal of right in criminal cases. *See In re Hamel*, 629 A.2d 802, 804 (N.H. 1993); *State v. Cooper*, 498 A.2d 1209, 1213-16 (N.H. 1985); *State v. Rogers*, 434 S.E.2d 402, 405 (W. Va. 1993).

Likewise, in civil cases, for the first 159 years of this nation's history, § 22 of the Judiciary Act of 1789 and its successors allowed appeal only on a "writ of error." *See* 1 Stat. 84 (1789); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 61-62, 101-05 (1923). As *amicus* and other scholars summarized at length in *Gasperini*, in numerous decisions prior to 1948 (when the relevant statutory language was omitted from the judicial code) this Court repeatedly refused to review claims by civil litigants that a jury's damage award was either inadequate or excessive. *See Gasperini Amicus* Br., *supra* note 6, at 6-11, 22-24.

In its punitive damages decisions during the past decade, and in its *Gasperini* decision, this Court has authorized federal appellate review of the size of jury verdicts under the "rational factfinder" standard, conducted on the record of the case with all inferences drawn in favor of the verdict, in light of applicable substantive law. This is the same standard of appellate review used in other areas of litigation, both criminal and civil, to measure a jury verdict's conformity with applicable law. There is no basis for any suggestion that the "rational factfinder" standard of review fails to comport with due process. As the respondent in *Oberg* pointed out without contradiction, to hold that the "rational factfinder" test does not satisfy due process would effectively constitutionalize weight-of-the-evidence review, seriously disrupting criminal and civil litigation nationwide. *See* Brief of Respondent in No. 93-644 (filed Apr. 1, 1994) at 14, 17 n.17, 38-50.

II. ANY FEDERAL APPELLATE REVIEW OF JURY FACTFINDING LESS DEFERENTIAL THAN THE "RATIONAL FACTFINDER" STANDARD IS CONSTITUTIONALLY AND STATUTORILY BARRED

In addition to the above considerations, the argument of Cooper and its *amici*, founded largely on the Third Circuit's *Inter Medical Supplies* decision, that federal appellate courts should engage in "rigorous" review of punitive damage awards, exhibiting little if any deference to the jury, see pp. 4 & n.3, *supra*, conflicts with fundamental strictures on the scope of federal appellate review. By definition, an appellate court that does not limit itself to the issue of whether a rational factfinder could have reached the jury's result, on the trial record and under applicable law, must be engaging in weight-of-the-evidence review or *de novo* review of the factual issue of what is the proper amount of punitive damages in a particular case.[12]

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[12] Substantively there are only three review standards that a judge can employ in reviewing a jury's verdict: review of whether the jury's result is *rational* on the record, review of whether the jury's result is supported by the judge's own assessment of the *weight* of the evidence, and *de novo* review of whether the judge would have reached the precise result reached by the jury, had he or she been the factfinder. *See* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 Cornell L. Rev. 1115, 1126-27 (1987). The "rational factfinder" test does not involve any sort of weight-of-the-evidence review of the jury's verdict. In *Tibbs v. Florida*, 457 U.S. 31 (1982), the Court stated that the *Jackson* test "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt," so that "[t]he Due Process Clause . . . sets a lower limit on an appellate court's definition of evidentiary sufficiency," but it emphasized that "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Id.* at 45 & n.21 (quoting *Jackson*, 443 U.S. at 319). *See also Herrera v. Collins*, 506 U.S. 390, 402 (1993) (review under *Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal"). Thus, it would appear that by rejecting the "rational factfinder" standard, Cooper and its *amici* must be embracing the proposition that a federal appellate court may engage in weight-of-the-evidence review (or even de novo review) of a jury's punitive damages verdict.

As *amicus* and other scholars explained in *Gasperini*, this form of federal appellate review is entirely improper. Appellate weight-of-the-evidence or *de novo* review of jury verdicts has been barred by statute since the enactment of the Judiciary Act of 1789, § 22, 1 Stat. 84-85, to the present day, *Gasperini Amicus* Br., *supra* note 6, at 22-24, a statutory structure which is both compatible with basic fairness to litigants and which promotes efficiency. *Id.* at 24-30. Even more fundamentally, the sort of intensive review of jury verdicts advocated by Cooper and its *amici* has been barred by the Re-Examination Clause of the Seventh Amendment since the enactment of the Bill of Rights in 1791. *Id.* at 4-21. As *amicus* has argued previously:

> This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Id. at 19 (quoting *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887), and citing *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915)).

According litigants the right to appellate weight-of-the-evidence review would impose on appellate courts in every case the burden "to examine in some detail all of the evidence," rather than simply to confirm that the jury's result is supported by "adequate evidence in the record." *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995) (Newman, J.). This would duplicate work already competently done by trial judges and inevitably undermine confidence in trial judges. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 781-82 (1957). And by encouraging disappointed litigants to appeal in an effort to re-try the facts, it would lead to greater docket congestion and less time for attention to serious issues of law. *See* Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Tex. L. Rev. 949, 967-68 (1964); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2d* § 2819, at 204 (2d ed. 1995).

In *Gasperini*, the Members of this Court disagreed over whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages (that is, although not a preset cap, what amounted to a "soft cap" dependent in part on the facts of the case) that could be applied by the district court, followed by appellate review for "legal" error under an abuse-of-discretion standard. But as *amicus* reads the *Gasperini* opinions, no Member of the Court disputed that the Seventh Amendment bars a federal appellate court from engaging in weight-of-the-evidence review. The dispute in *Gasperini* was simply over whether the New York statute should be viewed by federal district courts as imposing a "soft cap," with federal appellate courts properly policing the outer boundaries of district court rulings applying this cap, or whether instead such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing of jury verdicts. *See Gasperini*, 518 U.S. at 434-38 (opinion of the Court) (viewing New York statute as

imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis and therefore reviewable on appeal as a matter of law); *id*. at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

Under *Gasperini*, the invalidity under the Seventh Amendment of the "intensive review" standard used by the Third Circuit and advocated by Cooper and its *amici* is clear. By contrast, it would appear (especially in light of *Gasperini*) that the "rational factfinder" standard of review for punitive damages followed by most circuits is compatible with the Seventh Amendment. Thus, in *Gasperini*, *amicus* and other scholars confined their argument to a demonstration of the impermissibility of any weight-of-the-evidence review in civil cases by federal appellate courts, raising no question as to "whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process 'reasonableness' standard." *Gasperini Amicus* Br., *supra* note 6, at 20 & n.19 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), and *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.)).

CONCLUSION

When a criminal or civil litigant has lost a jury trial and has failed on all available procedural objections to the trial, appellate review of the substance of the jury's finding has traditionally been sharply limited, so as to leave to the jury and trial court the role of evaluating the weight of the evidence. This Court should apply in the punitive damages context the standard of appellate review that traditionally has been used in both criminal and civil litigation when one party argues that the result reached by the jury is not sustainable under the relevant law on the particular record of the case: the "rational factfinder" standard.

Respectfully submitted.

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APPENDIX

QUALIFICATIONS OF *AMICUS CURIAE*

Arthur F. McEvoy is the J. Willard Hurst Professor at the University of Wisconsin Law School, where he teaches American legal history. He has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a Research Fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was lead counsel on an *amicus* brief filed by legal historians on that issue that was cited by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994).